

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)	
)	
FIRST FINANCIAL ASSOCIATES, INC.,)	CASE NO. 99-62270 JPK
)	Chapter 7
Debtor.)	
*****)	
KENNETH A. MANNING)	
Plaintiff/Trustee)	
v.)	ADVERSARY NO. 01-6148
DOROTHY L. WALLACE and)	
DOROTHY L. WALLACE, Personal)	
Representative of the Estate of Darrell E.)	
Shults, Deceased and sole Heir; and First)	
National Business Group, Inc.; and First)	
Financial Mortgage, Inc.; and Elmer Shults)	
Defendants.)	

MEMORANDUM OF DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This adversary proceeding has had a long and convoluted course, and as a result of its twisted path, it is necessary to first delineate the scope of this decision. As will be explained, this determination concerns only the plaintiff's motion for summary judgment against the defendant Dorothy Wallace personally, and the cross motion for summary judgment of that defendant against the plaintiff. It does not concern any claim asserted by the plaintiff against Dorothy Wallace in her capacity as personal representative of the Estate of Darrell E. Shults, deceased; it does not concern the cross-motion for summary judgment asserted against the plaintiff by Dorothy Wallace in her capacity as personal representative of the Estate of Darrell E. Shults, deceased; it does not concern any claim asserted by the plaintiff against First National Business Group, Inc.; it does not concern any claim asserted by the plaintiff against First Financial Mortgage, Inc.; and it does not concern any claim asserted by the plaintiff against Elmer Shults.

This adversary proceeding was initiated by the complaint of Kenneth A. Manning, Chapter 7 Trustee ("Trustee") of First Financial Associates, Inc. ("Debtor") filed on June 29,

2001. The complaint designated five (5) defendants: Dorothy L. Wallace personally; Dorothy Wallace as the personal representative of the Estate of Darrell E. Shults, deceased; Elmer Shults; First National Business Group, Inc.; and First Financial Mortgage, Inc. Putting aside, without reviewing, the procedural issues – and determinations on those issues – which preceded it, by order entered by the Honorable Kent Lindquist on August 21, 2003, the plaintiff was ordered to file his motion for summary judgment on or before October 31, 2003; responses from the parties against whom that summary judgment was sought were ordered to be filed on or before December 15, 2003; and the plaintiff's reply to those responses was ordered to be filed on or before January 15, 2004.

The Trustee filed a motion for summary judgment on October 31, 2003. Accompanying the motion was Plaintiff's Statement of Material Facts, Legal Memorandum in Support of Plaintiff's Motion for Summary Judgment, Summary Judgment Exhibits (Ex. 1-23), and Plaintiff's Request for Judicial Notice.

Defendant Elmer Shults filed a document on November 14, 2003, designated as "Complaint". On December 15, 2003, Mr. Shults filed a document designated as "Defendants [sic.] Response Summary Judgement"; a document entitled "Defendants [sic.] Response to Plaintiff's S [sic.] Summary of Mat. Facts"; a "Complaint"; a "Motion to Dismiss by Defendant Elmer Shults Pursuant to Rule 56 N 27"; a "Defendants [sic.] Demand for Jury Trial"; and a "Defendants [sic.] Statement for Material Facts".

On January 14, 2004 – in accordance with court-approved extensions – Wallace filed a Memorandum and Argument on Trustee's Motion for Summary Judgment and for Her Summary Judgment, as well as two exhibits attached thereto. (Ex. A1 and A). On the same day, Wallace filed a Response to Trustee's Motion for Summary Judgment and for Summary Judgment on Her Own.

On February 24, 2004, the Court issued its "Order Concerning Further Proceedings

Regarding Plaintiff's Motion for Summary Judgment". In part pertinent to this decision, that order deemed Wallace's response to the plaintiff's motion for summary judgment filed on January 14, 2004 to be a cross motion for summary judgment, in addition to being a response to the Trustee's motion; required the Trustee to file a response to Wallace's cross-motion for summary judgment and a reply to Wallace's response to his motion for summary judgment by April 16, 2004; required any reply by Wallace to the Trustee's response to her cross-motion for summary judgment to be filed by May 17, 2004; and provided that any response by the Trustee to Shults' response to his motion for summary judgment be filed by April 16, 2004.

On April 16, 2004, the Trustee – then a neophyte with respect to the ECF system – filed a flurry of separate documents which related to his summary judgment proceeding, which the Clerk's staff very painstakingly and painfully relinked to the correct entry in the docket record. Trustee's Response to Dorothy Wallace's Motion for Summary Judgment on Her Own, and Trustee's Statement of Genuine Issues in Response to Dorothy Wallace's Cross Motion for Summary Judgment was filed on April 16, 2004. In addition, Trustee filed three (3) affidavits: 1) an Affidavit of Kenneth A. Manning Regarding Zurich Kemper Premium Payments, 2) an Affidavit of Kenneth A. Manning Regarding Cash/Checks Payments to Wallace/Darrell, and 3) an Affidavit of Kenneth A. Manning Regarding Wallace Signature as Secretary.

Wallace's Reply Memorandum and Argument on Trustee's Response to Wallace's Motion for Summary Judgment was filed on May 15, 2004.

Mr. Shults then responded with his own plethora of filings in response to those made by the Trustee, to which the Trustee responded with a flurry of filed documents. All of this scurrying and flurrying of documents culminated with the Court's order of December 2, 2004, which is not pertinent to this decision but which was necessary to clear the path for consideration of the pending motions for summary judgment and responses and replies thereto.

In reviewing what was by then an extremely muddled record, by its order of February 4,

2005, the Court scheduled a hearing to seek to sort out exactly what, who, where and when was before it with respect to the Trustee's motion for summary judgment and the replies of the defendants Wallace and Shults thereto. At a hearing held on March 17, 2005 pursuant to that order, the Court addressed the issues which the Trustee deemed to have been submitted to the Court with respect to his motion for summary judgment. That hearing has been memorialized with a transcript, which the Court and the Court's judicial law clerk have painstakingly reviewed, in order to delineate the issues before the Court for the purpose of this decision.¹ That review has resulted in the conclusion that the following issues are before the Court for the purposes of this decision with respect to the Trustee's motion for summary judgment against Dorothy Wallace personally², and that defendant's cross-motion for summary judgment against the Trustee:³

A. Under the following theories:

1. 11 U.S.C. § 548(a)(1) (A) [actual fraud];

¹ As a result of that hearing, the Court deemed it necessary to conduct another ancillary hearing with respect to the Trustee's motion for summary judgment against Elmer Shults. That hearing was held on April 21, 2005, and resulted in the Court's order of April 29, 2005 which denied the Trustee's motion for summary judgment with respect to Elmer Shults, leaving for another day the resolution of the Trustee's claims against Mr. Shults by means of a trial. Thus, the Trustee's claims against Elmer Shults are not before the Court for the purposes of this decision.

² The purpose of the March 17, 2005 hearing was principally to require the Trustee, as plaintiff/movant, to delineate three things: each "item" with respect to which his complaint seeks recovery; the "target defendant(s)" with respect to each item; and the legal theories asserted by the Trustee/plaintiff/movant upon which his actions against the target defendant(s) with respect to each item are grounded in his summary judgment motion. The transcript establishes that there was no mention by the Trustee of Dorothy Wallace **in her capacity as the personal representative of the Estate of Darrell Shults** as being a "target" of his summary judgment motion, and thus the Court deems there to be no issue before it as to claims against that designated defendant *with respect to the Trustee's motion for summary judgment*.

³ If these are the not parties' intended *foci*, the Court has done all it's going to do at this stage of the case to delineate the issues to which the Trustee's motion for summary judgment, and Wallace's cross-motion for summary judgment, relate. Appreciating the novelty of the circumstances, the Trustee's duty to assert any potential theory of recovery, and Wallace's desire to avoid liability – and without being overtly pejorative – the Trustee's motion for summary judgment and its related permutation and combination replies/responses are the least defined, most ambiguous and most nebulous submissions the Court has yet had the pleasure of reviewing for the purpose of summary judgment proceedings.

2. 11 U.S.C. § 548(a)(1)(B) [constructive fraud];
3. 11 U.S.C. § 544(b)(1):
 - a. Under §§ 14 and 15 of the Indiana Uniform Fraudulent Transfers Act;
 - b. Breach of fiduciary responsibility owed by a corporate officer to the corporation;
 - c. Piercing the corporate veil to impose personal liability on an officer of the corporation, or upon a third person;
 - d. Personal liability of a corporate officer for acts engaged in by that person in the context of the business of a corporation.

With respect to the following "items":

1. \$151,273.90 proceeds received by Dorothy Wallace as the beneficiary of Kemper Zurich policy "644";
2. \$795 of premiums paid by the Debtor with respect to Kemper Zurich policy "646";⁴
3. \$1024 of premiums paid by the Debtor with respect to "New York Life" policy;
4. \$8068.97 of premiums paid by the Debtor with respect to Valley Forge Policy "ARC";
5. \$8068.97 of premiums paid by the Debtor with respect to Valley Forge Policy "TRC";
6. \$1200 of premiums paid by the Debtor with respect to Mutual Group Life Insurance;
7. \$1023.86 of expenses charged by Wallace for an alleged personal vacation to the Debtor's GE Capital credit card account;

B. Under 11 U.S.C. § 544(b)(1):

1. Breach of fiduciary responsibility owed by a corporate officer to the

⁴ At the hearing held on March 17, 2005, the Trustee confirmed that he is seeking only to recover this amount from Dorothy Wallace, but that he is seeking to recover approximately \$100,000 of the death benefit proceeds paid out under this policy from Elmer Shults. As stated above, the Trustee's claims against Mr. Shults are not within the scope of this decision.

corporation;

2. Piercing the corporate veil to impose personal liability on an officer of the corporation, or upon a third person;
3. Personal liability of a corporate officer for acts engaged in by that person in the context of the business of a corporation.

With respect to the following item:

1. \$305,000 of unpaid investments made in the debtor by persons to whom the Debtor made unfulfillable promises to repay.

The foregoing establishes the scope of the Trustee's motion for summary judgment, and it also establishes the scope of this decision and the determination of all dispositive motions now before the Court.

N.D.Ind.L.B.R. B-7056 states:

In addition to complying with the requirements of N.D. Ind. L.B.R. 7007-1, all motions for summary judgment shall be accompanied by a **"Statement of Material Facts"** which shall either be filed separately or as part of the movant's initial brief. **The "Statement of Material Facts" shall identify those facts as to which the moving party contends there is no genuine issue** and shall be supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence. **Any party opposing the motion shall**, within thirty (30) days of the date the motion is served upon it, **serve and file a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue**, supported with appropriate citations to discovery responses, affidavits, depositions or other admissible evidence, together with any affidavits or other documentary material **controverting the movant's position**. The "Statement of Genuine Issues" may either be filed separately or as part of the responsive brief. In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, **except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion**, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file. [emphasis supplied].

In support of his motion for summary judgement, on October 31, 2003, the Trustee separately filed a "Plaintiff's Statement of Material Facts", in compliance with N.D.Ind.L.B.R. B-7056-1. On January 14, 2004, Wallace filed two documents. The first, "Wallace's Memorandum and Argument on Trustee's Motion for Summary Judgment and for Her Summary Judgment",⁵ including two exhibits attached thereto (Ex. A1 and A), appears to be intended by Wallace as a legal memorandum in support of her position and in contravention of the Trustee's. This document has very little in the way of factual references. The second document is entitled "Dorothy Wallace's Response to Trustee's Motion for Summary Judgment and for Summary Judgment of Her Own". This document has extensive references to "factual" materials in the record, in a narrative format. Nowhere in either document is there a "Statement of Genuine Issues", either within the brief or filed separately, as required in response to the Trustee's "Statement of Material Facts". Nowhere in either document is there a "Statement of Material Facts", either within the brief or filed separately, as required with respect to Wallace's cross-motion for summary judgment. Instead, peppered throughout "Dorothy Wallace's Response to Trustee's Motion for Summary Judgment and for Summary Judgment of Her Own" are references to record materials which Wallace apparently deems controvert the "Statement of Material Facts" submitted by the Trustee. This littering of a brief with factual assertions in opposition to a "Statement of Material Facts" designated as such by a summary judgment movant is precisely the practice that N.D.Ind.L.B.R. B-7056-1 was designed to overcome, patterned as it is after similar rules adopted by many federal and state trial courts that are called upon to review summary judgment motions. In the context of a response to a "Statement of Material Facts" submitted by a party moving for summary judgment, the litany of a string of

⁵ This response to plaintiff's motion for summary judgment was deemed to be a cross-motion for summary judgment, in addition to being defendant's response to the plaintiff's motion for summary judgment. See Court's Order of February 24, 2004.

factual references does nothing to apprise the court of the specific facts asserted by the moving party which the responding party deems to be in dispute, and it is left to the court to surmise and speculate and guess (OH MY!) as to the target "facts" stated by the movant which the respondent's recitation is intended to controvert. In the context of a submission in support of a motion for summary judgment, the random recitation of facts in a brief does little to alert either the Court or the opponent of the motion to the specific facts in the record which the movant deems pertinent to the issues it wishes to submit for summary judgment review, and such a format entirely lacks the "framing" quality with respect to the factual record before the Court which N.D.Ind.L.B.R. B-7056 , and for that matter Fed.R.Civ.P. 56, are intended to achieve. It is not the function of a court to sort out the factual issues that give rise to a genuine issue of material fact, but rather it is the duty of the proponent/opponent of a summary judgment motion to specifically advise the court of the factual assertions which are, or are not, in dispute. "[T]he [trial] court need not wade through the record on a motion for summary judgment . . . [I]t is the obligation of the non-moving party to present evidence indicating that there is a genuine issue of fact, " *L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.*, 9 F.3d 561, 567 (7th Cir. 1993). The "Trustee's Statement of Genuine Issues in Response to Dorothy Wallace's Cross Motion for Summary Judgment", filed on April 16, 2004, better follows the required format, but it also falls short of the ideal due to its failure to identify the "facts", and the location in the summary judgment record of the recitation of those "facts", asserted by the movant with which it takes issue.

The Court deemed Wallace's Memorandum and Argument on Trustee's Motion for Summary Judgment and for Her Summary Judgment to be a cross-motion for summary judgment, both with respect to the Trustee's claims against Wallace personally, and with respect to the Trustee's claims against Wallace in her separate capacity as personal representative of the Estate of Darrel Shults, Deceased. In the context of a cross-motion for

summary judgment, Wallace has entirely failed to comply with the requirements of N.D.Ind.L.B.R. B-7056-1 as to a "Statement of Material Facts": Again, references to a record scattered in a brief are not in compliance with the Rule, and in fact the record references in Wallace's submission are interspersed with what can only be characterized as "gloss" in relation to "facts" referenced in the same paragraph, leaving it to the Court to throw the paragraph up into the air to see what the wind of wasted judicial time might sort out as the "wheat" of fact falling into a blanket below, from the "chaff" of inadmissible grist blown away by the wind. That is not the Court's function, as N.D.Ind.L.B.R. B-7056-1 makes clear.

Wallace's submissions, instead of identifying material facts as to which it is contended there exists no genuine issue [viewed in terms of Wallace as the movant on her cross-motion for summary judgment], or instead of identifying "material facts as to which it is contended there exists a material issue" [viewed in terms of Wallace as the respondent to the Trustee's motion for summary judgment], does nothing more than state references to materials in the record, leaving it to Court to sort through her Chex® mix response to determine which of her assertions is a peanut in response to a peanut, which is a Wheat Chex® in response to a Wheat Chex®, and which is just an unidentifiable fragment from being left in the party bowl too long.

As stated in footnote 4, the summary judgment record in this case, more than any other yet confronted, only entrenches the Court in its belief that the efficiency and speed of case processing, particularly with respect to issuing final judgments, is ill served by the Rule 56 summary judgment mechanism in cases presented to this Court. This case would have been tried and determined long ago, but for the fact of pending Rule 56 proceedings which required extensive, and unjustifiable, expenditures of time by the Court and by the litigants to just sort out the issues, and then the material facts, to which the Court was being directed and the portions of the record to be considered in relation to those issues.

The bottom line is this. Wallace has failed to comply with N.D.Ind.L.B.R. B-7056-1, both

with respect to her obligation to delineate a "Statement of Genuine Issues" in response to the Trustee's "Statement of Material Facts" concerning the Trustee's motion for summary judgment, and with respect to providing the "Statement of Material Facts" required of her in support of her cross-motion for summary judgment. As a result, Wallace has failed to present a record to the Court in support of her cross-motion for summary judgment in any context with respect to assertion of claims by the Trustee against her in her capacity as personal representative of the Estate of Elmer Shults, Deceased. As noted above, the Trustee has not presented a summary judgment to the Court with respect to his claims against Wallace as personal representative of the Estate of Elmer Shults, Deceased. Accordingly, any and all claims asserted by the Trustee against Dorothy Wallace as personal representative of the Estate of Elmer Shults, Deceased will be resolved by a trial.

Turning to Wallace's response to the Trustee's motion for summary judgment with respect to her personally, due to her noncompliance with N.D.Ind.L.B.R. B-7056-1, any "facts" asserted by Wallace in her responses to that motion will be disregarded. As a practical matter, that doesn't mean much. The only additions to the record for the purposes of either parties' respective Rule 56 motions in supplementation of the Trustee's submissions are Exhibits "A" and "A1" attached to Wallace's Memorandum and Argument on Trustee's Motion for Summary Judgment and for Her Summary Judgment filed on January 14, 2004. Those two exhibits relate exclusively to issues concerning claims made against Wallace in her capacity as personal representative of the Estate of Elmer Shults, Deceased. All of the other documents and "facts" to which Wallace refers in her responses to the Trustee's claims asserted against her personally are already part of the Rule 56 record under the Trustee's submissions, and therefore must be taken into account by the Court in ruling on the Trustee's motion and Wallace's response to it.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.

§ 1334(b), 28 U.S.C. § 157, and N.D.Ind.L.R. 200.1(a) of the Rules of the United States District Court for the Northern District of Indiana. This adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(F) and (H).

I. Standards for Review of Motions for Summary Judgment

The procedural mechanism of summary judgment is provided by Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Fed.R.Bankr.P. 7056. The principal standard to be followed by the Court in determining a motion for summary judgment is stated as follows in Fed.R.Civ.P. Rule 56(c):

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The inquiry that the court must make is whether the evidence presents a sufficient disagreement to require trial or whether one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2509-10 (1986). In deciding a Motion for Summary Judgment, the Court should not "weigh the evidence." *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11; *Illinois Bell Telephone Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1087 (7th Cir. 1990). However, "if evidence opposing a summary judgment is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 106 S. Ct. at 2511; *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990).

The moving party bears the burden of showing that there is an absence of evidence to support the non-movant's case; *Celotex Corp. v. Catrett*, 106 S. Ct. at 2548, 2554 (1986), i.e., the lack of a genuine issue of material fact. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984).

When ruling on a motion for summary judgment, inferences to be drawn from underlying facts contained in such materials as attached exhibits and depositions must be viewed in a

light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 82 S. Ct. 993, 994 (1962); *See also, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356, (1986) (All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984); *Marine Bank Nat. Ass'n. v. Meat Counter, Inc.*, 826 F.2d 1577, 1579 (7th Cir. 1987).

When a motion for summary judgment is made and supported by the movant, Fed.R.Civ.P. 56(e) requires the nonmoving party to set forth specific facts, which demonstrate that genuine issues of fact remain for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. at 1355; the opposing party may not defeat the motion by merely relying on the allegations or denials in its pleadings.

As to the standard of proof, it should be noted that the Supreme Court in the case of *Anderson, et. al. v. Liberty Lobby, Inc. and Willis A. Carto*, 106 S. Ct. 2505 (1986) held that in determining whether a factual dispute exists on a motion for summary judgment, the court must be guided by the substantive evidentiary standards of the case that are applicable at trial.

II. Materials to be Considered by the Court

Fed.R.Civ.P. Rule 56(c) provides that the Court is to consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in determining whether or not a genuine issue/genuine issues of material fact exist.

The record for the purposes of the Trustee's motion for summary judgment is provided by the Plaintiff's Statement of Material Facts filed on October 31, 2003, and the Trustee's Statement of Genuine Issues in Response to Dorothy Wallace's Cross Motion For Summary Judgment filed on April 16, 2004.

The undisputed material facts are the following:

1. The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy

Code on June 30, 1999 [Court's record].

2. Kenneth A. Manning is the duly appointed and acting Chapter 7 Trustee of Debtor's Chapter 7 bankruptcy estate [Court's record].

3. Debtor was an Indiana corporation; Darrell was its 100% shareholder, a director, and its President. [Plaintiff's Statement of Material Facts ¶3; complaint ¶¶ 6 & 7; Wallace's answer ¶¶ 6 & 7; Elmer's answer ¶¶ 6 & 7].

4. Debtor was established to conduct transactions relating to finance and financial consulting. [Trustee's exhibit 8 – Articles of Incorporation].

5. Debtor solicited monies and funds for investment opportunities from individuals by way of telemarketing/advertisements. Responding individuals received Investment Note Certificates; [Trustee's Stat. of Mat. Facts ¶ 48, and materials of record cited therein].

6. Between the years of 1996 and 1999, a total of 33 Investment Note Certificates were issued by the Debtor; the Debtor received a total of \$310,000.00 from the persons to whom it issued Investment Note Certificates. Investors responding to the advertisements received Investment Note Certificates, and a Prospectus dated either July 8, 1996 or August 1, 1997. [Trustee's Stat. of Mat. Facts ¶ 50 & 52, and materials of record cited therein].

7. Each of the Investment Note Certificates was signed by Darrell E. Shults as President and by Dorothy L. Wallace as Secretary; [Trustee's Stat. of Mat. Facts ¶ 49 & 52, and materials of record cited therein].

8. One investment note was paid at maturity in the amount of \$5,000.00. [Trustee's Stat. of Mat. Facts ¶ 51, and materials of record cited therein].

9. Investment Note Certificate holders were owed a total of \$305,000.00, plus accumulated interest of \$44,532.97, on the date of the commencement of this case. [Trustee's Stat. of Mat. Facts ¶ 54, and materials of record cited therein].

10. Recipients of the Investment Note Certificates each received a Prospectus dated

either July 8, 1996 or August 1, 1997. In the Paragraph designated as "Reliance on Management" on page 4 of this document, the document states:

Reliance on Management. The success of the Company's operations depend, to a large extent, upon the management, lending, credit, analysis and business skills of the senior level management of the Company. If members of senior level management were for some reason unable to perform their duties or were, for any reason, to leave the Company, there can be no assurance that the Company would be able to find capable replacements. The Company currently has employment agreements with Darrell E. Shults, the Company's President and Chief Executive Officer, and Dorothy L. Wallace, the Company's Secretary-Treasurer, but currently not with its other executive officers. The Company does not hold "key-man" insurance for its executive officers other than Darrell E. Shults and Dorothy L. Wallace.

[Trustee's Stat. of Mat. Facts ¶ 50 & 52, and materials of record cited therein].

11. Wallace was a live-in companion and fiancée of Darrell. [complaint ¶ 9; Wallace's answer ¶ 9; Elmer's answer ¶ 9; Trustee's Stat. of Mat. Facts ¶ 4], Investors responding to the advertisements received Investment Note Certificates, and a Prospectus dated either July 8, 1996 or August 1, 1997. [Trustee's Stat. of Mat. Facts ¶ 50 & 52, and materials of record cited therein].

12. On March 21, 1997, Debtor applied for a life insurance policy (#FK2379644) with Zurich Kemper Life Insurance ("Kemper Policy 644") in the amount of \$250,000.00, of which Debtor was the owner and sole beneficiary. [Trustee's Stat. of Mat. Facts ¶¶ 12 and 13], Investors responding to the advertisements received Investment Note Certificates, and a Prospectus dated either July 8, 1996 or August 1, 1997. [Trustee's Stat. of Mat. Facts ¶ 50 & 52, and materials of record cited therein].

a. The premiums for this policy were \$265.00⁶ per year; the Debtor made

⁶ Wallace, on pg. 9 of her motion for summary judgment states that "evidence shows that there was \$765 over a three year period paid by FFA on each policy." The Court deems the \$765 to be a numerical error, as the correct amount is \$795.

the premium payments in this amount on March 20 of 1997, 1998, and 1999; [Trustee's Stat. of Mat. Facts ¶ 14], Investors responding to the advertisements received Investment Note Certificates, and a Prospectus dated either July 8, 1996 or August 1, 1997. [Trustee's Stat. of Mat. Facts ¶ 50 & 52, and materials of record cited therein; Wallace's response pg. 7].

b. On April 8, 1999, as President of the Debtor, Darrell assigned and transferred ownership of this policy to himself, and contemporaneously changed the beneficiary from the Debtor as 100% beneficiary, to Wallace (60%) and Debtor (40%). [Trustee's Stat. of Mat. Facts ¶¶ 15 and 16, and materials of record cited therein; Wallace response pg. 7].

c. On June 7, 1999, Kemper paid Wallace \$151,273.90 as a death benefit under this policy arising from Darrell's death [complaint ¶ 26; Wallace's answer ¶ 26; Trustee's Statement of Material Facts, ¶ 17, and materials of record cited therein].

d. As a 40% beneficiary, Debtor received \$100,849.27. [Trustee's Summary of Mat. Facts pg. 13; Trustee's Ex. 11].

13. On January 31, 1997,⁷ Darrell applied for a life insurance policy from Kemper (#FK2379646) [Kemper policy 646], with respect to which Darrell was the owner and insured, and with respect to which Wallace was the primary beneficiary. [Trustee's Stat. of Mat. Facts ¶ 19, and materials of record cited therein; Wallace's response pg. 8].

a. The premiums for this policy were \$265.00⁸ per year; the Debtor made the premium payments in this amount on March 20 of 1997, 1998 and 1999; [Trustee's Stat. of

⁷ There is a disparity as to the date that this policy was issued. Trustee's Stat. of Mat. Facts ¶ 19 and Wallace's Answer to Interrogatories # 8 state the date of January 31, 1997. Wallace's response pg. 8 and Affidavit of Letitia Nelson ¶ 3 state the date of March 20, 1997. It appears to the Court, from Trustee's Exhibit # 12, that the policy was applied for on January 31, 1997 and issued on March 20, 1997. This inconsistency is irrelevant for the purposes of this decision.

⁸ Trustee on pg. 22 of his Legal Memorandum in Support of Plaintiff's Motion for Summary Judgment states that \$666.25 in premiums were paid on this policy. The Court cannot tell how this number was calculated. An affidavit of Letitia Nelson, Marked as Trustee's Exhibit 12, states that three premiums of \$265.00 were paid, totaling \$795.00.

Mat. Facts ¶ 20, and materials of record cited therein; Wallace's response pg. 8].

b. On June 3, 1999, Kemper paid Wallace \$252,123.17 as the death benefit under this policy arising from Darrell's death. [complaint ¶ 28; Wallace's answer ¶ 28; Trustee's Stat. of Mat. Facts ¶ 21, and materials of record cited therein].

14. On January 31, 1997, Wallace applied for a life insurance policy from CNA – Valley Forge Life Insurance Company ("CNA") (# TRCI000071); Wallace was the owner and insured with respect to this policy, and Darrell was the designated beneficiary; [Trustee's Stat. of Mat. Facts ¶ 22, and materials of record cited therein].

a. The Debtor paid all four (4) premiums on this policy from its corporate bank account: June 9, 1997 in the amount of \$3,932.25, May 4th and September 23, 1998 – in the amount of \$1,034.18 and \$2,068.36 respectively, and February 9, 1999 in the amount of \$3,932.25. The premiums totaled \$8,068.97.⁹ [complaint ¶ 31(b); Elmer's answer ¶ 31; Trustee's Stat. of Mat. Facts ¶ 23, and materials of record cited therein].

15. On January 31, 1997, Wallace applied for a life insurance policy from Valley Forge Life Insurance Company ("CNA") (#TRCI000028); Wallace was the owner and the insured with respect to this policy, and the Debtor was named the beneficiary. [Trustee's Ex. 18].

a. The Debtor paid all four (4) premiums on this policy from its corporate bank account: June 3, 1997 in the amount of \$3,932.25, May 4th and September 23, 1998 – in the amount of \$1,034.18 and \$2,068.36 respectively, and February 9, 1999 in the amount of \$1,034.18. The premiums totaled \$8,068.97. [complaint ¶ 31(a.); Elmer's answer ¶ 31; Trustee's Legal Memorandum in Support of Plaintiff's Motion for Summary Judgment, pg. 22].

⁹ Trustee on pg. 22 of his Legal Memorandum in Support of Plaintiff's Motion for Summary Judgment states that \$8,136.72 in premiums were paid on this policy. The Court cannot tell how this number was calculated in light of Trustee's Exhibit 19, which depicts that the total amount of premiums paid on this policy was \$8,068.97. The Court deems the figure of \$8,068.97 to be the correct amount.

16. On February 14, 1997, New York Life Insurance Company ("NYLIC") issued a life insurance policy (#A0328853) to Wallace, upon her application made on January 29, 1997. Wallace was the owner and insured with respect to this policy, and Darrell was the designated beneficiary; [Trustee's Stat. of Mat. Facts ¶ 25, and materials of record cited therein].

a. The Debtor paid all three (3) premiums on this policy from its corporate bank account: January 29, 1997 in the amount of \$350.00, March 2, 1998 in the amount of \$334.20, and February 9, 1999 in the amount of \$340.20. [complaint ¶ 31(b); Elmer's answer ¶ 31; Trustee's Stat. of Mat. Facts ¶ 26, and materials of record cited therein].

17. Debtor was the owner and Plan holder of Principal Life Insurance Company group health and life policy #N3505-4716 ("Principal Life"). Darrell was an employee plan member under this policy, and Wallace was the beneficiary. [Trustee's Stat. of Mat. Facts ¶ 27, 28, & 31, and materials of record cited therein].

a. On April 12, 1999, Darrell Shults, as an officer of the Debtor, withdrew \$3500 cash from the Debtor's corporate bank account by means of a check; [Trustee's Stat. of Mat. Facts ¶ 29, and materials of record cited therein].

b. On April 12, 1999, Darrell Shults obtained a cashier's check, by payment in cash, from NBD Bank, payable to Principal Life Insurance Company in the amount of \$1200.00, as payment for the premium on policy #N3505-4716; [Trustee's Stat. of Mat. Facts ¶ 30, and materials of record cited therein; Wallace's response pg. 8].¹⁰

¹⁰ While there is a permissible inference that Darrell used a portion of the cash withdrawn from the corporate account to purchase the cashier's check used to pay the premium on this policy, it is only an inference. In her response to ¶15 of the Trustee's Request for Admissions [Trustee's Exhibit 4], Wallace stated that from her review of documents "[i]t appears that Darrell may have gotten this money from a VISA Loan Advance from my [Wallace's] Credit Union account." For the purposes of the Trustee's motion for summary judgment, all inferences must be resolved against him. For the purpose of Wallace's cross-motion for summary judgment, all inferences must be resolved against her. There is thus a genuine issue of material fact as to whether the premium payment was in fact made with funds of the Debtor. Because the Trustee's theories of recovery of this premium payment from Wallace all depend upon the premium having been paid with the Debtor's funds, the Trustee's motion for summary judgment against Wallace with respect to this "item" must be denied. Wallace's cross-motion for summary judgment on this item

c. On August 1, 1999, Wallace received \$100,000. as the death benefit under the foregoing policy as a result of Darrell's death; [Trustee's Stat. Of Mat. Facts ¶31 and materials of record cited therein].

18. On December 11, 1998, a G.E. Capital Financial Visa Credit Card ("GE Capital") was issued to Debtor; [Trustee's Stat. of Mat. Facts ¶ 44, and materials of record cited therein].

19. During April 1999, Wallace traveled to Tampa, Florida on a personal trip, unrelated to the Debtor's business, and made use of the Debtor's GE Capital credit card, charging the sum of \$1,032.86. [Trustee's Stat. of Mat. Facts ¶¶ 45 & 46, and materials of record cited therein]. Wallace has never reimbursed the Debtor for these charges; [Trustee's Stat. Of Mat. Facts ¶47, and materials of record cited therein].

20. In Trustee's Ex. 23 – Affidavit of Kenneth A. Manning Financial Records/Tax Returns, materials concerning the Debtor's alleged "insolvency" [with reference to the definition of "insolvent" stated in 11 U.S.C. § 101(32) have been placed in the record. Paragraph "7X" of Trustee's exhibit is a Net Worth Report as of April 25, 1999. It shows that the Debtor had a negative balance of \$344,309.07. A Cash Flow Report for the period of January 1, 1999 through April 25, 1999 shows a negative cash flow of \$99.62. ¶ 7W. A Profit and Loss Statement covering the same period shows a negative balance of \$40,218.17. ¶ 7V. A Balance Sheet shows that as of April 25, 1999, the Debtor was in the red for \$14,019.43. ¶ 7U.

The Debtor's financial situation was not better during the year of 1998. A Cash Flow Report shows a negative balance of \$4,471.40. ¶ 7T. A Profit & Loss Statement for the same year shows a negative flow of \$105,351.49. ¶ 7S. A Balance Sheet figure as of December 31, 1998 shows a negative balance of \$14,119.05. ¶ 7R.

The year of 1997 was also full of losses. A Profit & Loss Statement for the whole year

remains viable to the extent of the legal contention that it is not recoverable from Wallace even were it assumed that the premium was paid with the Debtor's funds.

shows a negative balance of \$88,700.87. ¶ 7Q. A Cash Flow Report covering the year of 1996 shows a negative balance of \$3,077.73. ¶ 7P. A 1995 Cash Flow Report shows a positive balance of \$9,017.18. ¶ 7O. The Cash Flow Report for 1994 also shows the Debtor being in the dark for \$2,216.02. ¶ 7N. For a summary see Trustee's Ex. 23 – Facts/Insolvency chart and a Notes to Solvency Chart.¹¹

IV. Discussion

The Trustee's complaint asserts various claims regarding various transactions. As outlined above, the Trustee advances the following theories of recovery :

1. 11 U.S.C. § 548(a)(1) (A) [actual fraud];
2. 11 U.S.C. § 548(a)(1)(B) [constructive fraud];
3. 11 U.S.C. § 544(b)(1):
 - a. Under §§ 14 and 15 of the Indiana Uniform Fraudulent Transfers Act;
 - b. Breach of fiduciary responsibility owed by a corporate officer to the corporation;
 - c. Piercing the corporate veil to impose personal liability on an officer of the corporation, or upon a third person;
 - d. Personal liability of a corporate officer for acts engaged in by that person in the context of the business of a corporation.

with respect to the following "items":

1. \$151,273.90 proceeds received by Dorothy Wallace as the beneficiary of Kemper Zurich policy "644";
2. \$795 of premiums paid by the Debtor with respect to Kemper Zurich policy

¹¹ Based upon the materials referenced in paragraphs 6, 10 and 21– and the additional record materials before the Court pursuant to paragraphs 55, 56, 57, 58, 59 and 60 of the Trustee's "Plaintiff's Statement of Material Facts" filed on October 31, 2003, and materials of record cited therein -- the Court finds that there is no genuine issue as to any material fact as to the Debtor's being "insolvent" within the definition provided by 11 U.S.C. § 101(32) at all times relevant to this decision during the years 1997, 1998 and 1999.

"646";¹²

3. \$1024 of premiums paid by the Debtor with respect to "New York Life" policy;
4. \$8068.97 of premiums paid by the Debtor with respect to Valley Forge Policy

"ARC";

5. \$8068.97 of premiums paid by the Debtor with respect to Valley Forge Policy
- "TRC";

6. \$1200 of premiums paid by the Debtor with respect to Mutual Group Life Insurance;

7. \$1023.86 of expenses charged by Wallace for an alleged personal vacation to the Debtor's GE Capital credit card account;

With respect to \$305,000 of unpaid investments made in the debtor by persons to whom the Debtor made unfulfillable promises to repay, the Trustee asserts the following theories of recovery under 11 U.S.C. § 544(b)(1):

1. Breach of fiduciary responsibility owed by a corporate officer to the corporation;
2. Piercing the corporate veil to impose personal liability on an officer of the corporation, or upon a third person;
3. Personal liability of a corporate officer for acts engaged in by that person in the context of the business of a corporation.

All claims relating to each particular transaction will be addressed in turn. However, because the Trustee's theories of recovery are all involved in the disposition of the "item" designated as "Kemper Policy 644", the legal analysis of the Trustee's theories of recovery will be principally stated in the analysis with respect to that item

¹² At the hearing held on March 17, 2005, the Trustee confirmed that he is seeking only to recover this amount from Dorothy Wallace, but that he is seeking to recover approximately \$100,000 of the death benefit proceeds paid out under this policy from Elmer Shults. As stated above, the Trustee's claims against Mr. Shults are not within the scope of this decision.

I. Kemper Policy 644 - \$151,273.90

The Trustee, by utilizing his powers under § 548, § 544 and Ind. Code 32-18-2-1 *et. seq.*, attempts to recover from Wallace, in her individual capacity and as an officer and fiduciary of the Debtor corporation, a death benefit disbursement received by her. The allegations upon which this claim is based stem from the facts and circumstances which led to Wallace's receipt of a disbursement from a life insurance policy originally purchased by the Debtor, of which the Debtor was the owner, and with respect to which the Debtor was the 100% beneficiary. More particularly, the Trustee alleges that his recovery is based on the fact that five days prior to committing suicide, Darrell, the president of the Debtor corporation, changed the ownership of this life insurance policy from the Debtor to himself and contemporaneously changed the beneficiary of the policy from solely the Debtor to 40% Debtor and 60% Wallace. About two months after Darrell's death on April 13, 1999, on June 7, 1999, Wallace received her 60% share of the value of the policy, \$151,273.90.

11 U.S.C. § 548(a)(1)(A)

11 U.S.C. § 548(a)(1)(A), as applicable to this adversary proceeding, provides:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 1 year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

The burden of proving a fraudulent transfer under § 548 is on the Trustee. *Friedrich v. Mottaz*, 294 F.3d 864, 867 (7th Cir. 2002).

The cause of action under § 548(a)(1)(A) requires the Trustee to establish the Debtor's actual intention to hinder, delay, or defraud creditors. *In re FBN Food Serv., Inc.*, 82 F.3d 1387,

1394 (7th Cir. 1996), *In re Scott*, 227 B.R. 834, 843 (Bankr. S.D.Ind. 1998). Debtor's actual intent to defraud under § 548(a)(1)(A) can be established or inferred by offering of proof on various 'badges of fraud'. They include the following:

(1) absconding with the proceeds of the transfer immediately after their receipt; (2) absence of consideration when the transferor and transferee know that outstanding creditors will not be paid; (3) huge disparity in value between the property transferred and the consideration received; (4) fact that the transferee was an officer, or agent or creditor of an officer of corporate transferor; (5) insolvency of the debtor; and (6) existence of a special relationship between the debtor and the transferee. *Carmel v. River Bank Am. (In re FBN Food Servs., Inc.)*, 175 B.R. 671 (Bankr.N.D.Ill.1994), *aff'd*, 185 B.R. 265, 275 (N.D.Ill.1995), *aff'd*, 82 F.3d 1387 (7th Cir.1996). Where the transferee is an insider of the debtor and is in a position to control the disposition of property of the debtor, the transferee's intent is imputed to the debtor. *Id.* 185 B.R. at 275 (transactions with insiders must be rigorously scrutinized).

In re H. King & Associates, 295 B.R. 246, 283 (Bankr. N.D. Ill. 2003).

Before the Court goes any further, it must first be stated that this claim stems from actions of the president of the Debtor corporation, Darrell Shults. Many courts have held that in the context of a corporate debtor, courts may look into the fraudulent intent of its controlling members. *General Search*, 322 B.R. at 285, citing *In re Rico Corp.*, 701 F.2d 978, 984 (1st Cir.1983). See also *Armstrong v. Kettering (In re Anchorage Marina, Inc.)*, 93 B.R. 686, 691 (Bankr. D. N.D.1988) ("In cases such as this one in which the Debtor is a corporation the intent of the controlling officers and directors is presumed to be the Debtor's intent.") (citation omitted). Thus, for purposes of this cause of action, the Court will consider the actions of Darrell, who was the founder, 100% shareholder, director and President, of the Debtor.

The Trustee argues that the Debtor acted fraudulently when Darrell changed the ownership of Kemper Policy 644 from Debtor to himself and then contemporaneously changed the beneficiary of that life insurance policy from 100% Debtor, to 40% Debtor and 60% Wallace, just five days before his death by suicide. Wallace, in her attempt to negate any liability on her

part, states that the Trustee cannot avoid and recover from her the \$151,273.90 (money Wallace received after Darrell committed suicide) because at the time Darrell made the change in ownership and beneficiaries, the policy had no cash value; [Transcript of March 17, 2005 hearing, at 37, 44]. Thus, according to Wallace, the change of beneficiaries here had no impact on either the Debtor or its creditors. *Id.* at 43.

The threshold issue is the identification of the "interest of the debtor in property" under § 548(a) implicated in the Debtor's transfer, by and through Darrell, in relation to Kemper Policy 644 *under the circumstances of this case*. As established by the Supreme Court in *Bezier v. Internal Revenue Service*, 110 S.Ct. 2258 (1990), interests of a debtor in property for the purpose of analysis under provisions of the Bankruptcy Code is not strictly a question of state law, but also requires reference to the intent of Congress in the use of the term "property" in various provisions of the Code. In *Bezier* the Court stated:

The Bankruptcy Code does not define 'property of the debtor.' Because the purpose of the avoidance provision [in *Bezier* 11 U.S.C. § 547(b)] is to preserve the property includable within the bankruptcy estate – the property available for distribution to creditors – 'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.

110 S.Ct. at 2263.

What then would have been property of the Debtor's estate had the transfer of ownership and change of beneficiary of Kemper Policy 644 not been made? Clearly, the 100% death benefit proceeds would have been, including that part of those benefits received by Wallace as a result of the transfer. The facts of this case are unique, but not difficult to sort out. Without any reasonable inference in this record to the contrary, at the time Darrell Shults changed the ownership and beneficiary on the policy, he knew that he was going to take his life, and he knew that his actions in transferring the policy and in changing the beneficiary would

result in 60% of the proceeds of the policy derived from his action – an act totally within his control – would deprive the Debtor of funds necessary to pay its obligations to the corporation's creditors. Knowing, as he clearly did, that his death would result in a payment of \$250,000 to someone, the actions of Darrell in relation to the policy were tantamount to the transfer of 60% of the policy benefits to other than the corporation's creditors, just as if the corporation had had \$250,000 in a bank account, and he had transferred 60% of the account to Wallace immediately prior to his committing suicide. Under the circumstances, the transfer effected by Darrell by changing the ownership of Kemper Policy 644 and then changing the beneficiary was the equivalent of transferring \$151,273.90 to Wallace. Thus, given Darrell's total control over the triggering mechanism for payment of the policy's benefits, and his obvious intent to exercise that control by causing the payment of the benefit by his act of suicide, the "interest of the debtor in property" transferred, under the unique circumstances of this case, was the 60% of the full death benefit payable under the policy which was effected by the change of beneficiary to Wallace.¹³

As stated, the Court does not deem state law to be completely controlling in the context of the Trustee's action under § 548(a)(1)(A). To the extent Indiana law bears on this issue at all, detailed review of the Indiana cases did not provide the Court with a precise answer to the issue at bar.

The case of *Metropolitan Life Insurance Co., v. Tallent*, 445 N.E.2d 990 (Ind. 1983), a case which was certified to the Indiana Supreme Court by the Seventh Circuit Court of Appeals, is not on point. In *Tallent*, the issue of contention was "whether an insured may change the

¹³ This result is additionally underscored by the fact that the Debtor's Prospectus had represented that "key-man" insurance was held by the corporation with respect to Darrell, and thus that the proceeds of that policy – Kemper policy 644 – were viewed and understood by Darrell to be an asset of the Debtor upon which creditors of the corporation could rely in the event of his death, or should have been so viewed.

designation of beneficiary of a group life insurance policy during the pendency of a marriage dissolution proceeding in which a temporary restraining order, which restrains the insured from 'transferring . . . or in any way disposing of any property except in the usual course of business or for the necessities of life', is in effect." 445 N.E.2d at 991. The entire case hinges upon the definition of "property" under I.C. 31-1-11.5-2 in the context of whether the change of beneficiary with respect to a term life insurance policy by a husband in a dissolution of marriage action prior to his committing suicide, violates the terms of a predissolution restraining order under that statute. The court held that where an insurance policy has no surrender value, it is excluded from the definition of property within the statutory ambit. *Id.* The determination of the scope of "property" under I.C. 31-1-11.5-2 has no bearing on the scope of "interest of the debtor in property" under 11 U.S.C. § 548(a)(1).

The case of *State v. Tomlinson*, 45 N.E. 1116 (Ind. App. 1897) is equally inapposite. In *Tomlinson* the court mentioned in passing that a last minute change in beneficiary may be subject to the claims of creditors to avoid a transfer made in fraud of their rights, if an intent to defraud could be found. 45 N.E. at 1121. But in *Tomlinson*, the decedent, who had changed the beneficiary of a life insurance on the eve of his death from his estate to his wife, died of natural causes. The court wrote:

The law favors the making of reasonable provision by a man for his dependent family, and in Johnson v. Alexander, 125 Ind. 575, 25 N. E. 706, the supreme court of Indiana has said: "It is not a violation of the statute, and in fraud of creditors, for a debtor, though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family." In Pence v. Makepeace, 65 Ind. 345, it is held that only on the clearest proof of fraud, if at all, can the premiums paid by an insolvent debtor on a policy of insurance on his life for the benefit of his wife and children be revoked by his creditors, and in no event can any excess over the amount of the premium so paid be recovered.

Id.

The *Tomlinson* case is entirely distinguishable not only because it did not involve a

suicide by which the owner of the policy controlled the payment of benefits and orchestrated the payment of benefits to his intent to direct the policy proceeds, but also because the transfer of beneficiary benefitted the transferor's wife and children; here the transfer was not made for the benefit of family members, but was for the benefit of Wallace, the fiancé of the Debtor's president, Darrell.

In *Johnson v. Alexander*, 125 Ind. 575, 25 N.E. 706 (Ind. 1890), shortly before his death (again not by a suicidal act), Alexander transferred a portion of his policy to certain of his creditors to secure his indebtedness to those creditors. The family of Alexander asserted a claim to the balance of the life insurance not assigned to the creditor, to the detriment of other creditors of the decedent. As in *Tomlinson*, the *Alexander* court cited *Makepeace* 75 Ind. 485 for its holding that "only to the clearest proof of fraud, if at all, can the premiums paid by an insolvent debtor on a policy of insurance upon his life, for the benefit of his wife and children, be recovered by his creditors; and in no event can any excess over the amount of the premiums so paid be recovered." *Id.* at 707. This case does not involve a suicidal act, and thus in the Court's view its pronouncement that recovery is limited to premiums paid for a life insurance policy is not applicable to this case.

Under the circumstances of this case, the "interest of the debtor in property" transferred by the Debtor, by Darrell's acts, was the 60% interest in the **proceeds** of Kemper Policy 644 generated by Darrell's act of suicide.

The Court finds that the Debtor acted with an actual intent to hinder, delay or defraud its creditors when Darrell transferred the ownership of, and changed the beneficiaries with respect to, the Kemper Policy 644. Darrell, knowing of his imminent demise, and knowing that the assets of the corporation without 100% of the policy proceeds could not possibly satisfy the

indebtedness owed to the Certificate holders¹⁴ and the Prospectus' promise of "key-man" insurance on his life – intentionally diverted assets of the Debtor which would be created by his intended death to other than the corporation's creditor. Thus, under the "badges of fraud" analysis of *In re King & Associates*, supra., there was a total lack of consideration from Wallace under circumstances in which at least Darrell knew that creditors wouldn't be paid; there was a huge disparity in value between the amount transferred to Wallace (60% of the policy proceeds) and the consideration given by Wallace for the transfer (0); while perhaps not a "functioning" officer of the Debtor, it is beyond question that Wallace was an officer of the Debtor, at the very least by representations made by the Debtor to third parties; the Debtor was insolvent when the transfer was made; and there was a special relationship between the Debtor (in essence Darrell) and the transferee Wallace. More to the point, the record establishes, without there being any genuine issue as to any material fact about it, that Darrell intended to disadvantage the corporation's creditors by placing 60% of the proceeds of Kemper Policy 644 into the hands of Wallace when he took his own life. Wallace's argument that the Debtor's creditors were not harmed is simply a warrantless assertion.

The Trustee relies extensively on the case of *In re Wolensky's Ltd. P'ship.*, 163 B.R. 615 (Bankr. D. D.C. 1993). The Court does not deem that case to be as "on point" as does the Trustee; although a suicide by a partner who changed the beneficiary on a life insurance policy payable to the partnership for the benefit of its creditor was involved, the principal issues in the case were the deceased partner's authority to make the change of beneficiary on behalf of the partnership, and the ultimate beneficiary's entitlement to an exemption with respect to the policy proceeds. The Court did not determine whether the "transfer" involved a fraudulent

¹⁴ It must also be noted that the amount of the policy (\$250,000) nearly mirrored the amount of the "investments" made by Certificate holders (\$310,000), in fact mirrored more closely the amount still owed on the initial investments given that one \$5000. "investor" had been paid in full prior to Darrell's death.

conveyance, but merely on that issue denied the defendant's motion to dismiss on the assertion that it did not.

The Court determines that the Trustee is entitled to summary judgement on his claim under 11 U.S.C. § 548(a)(1)(A) for avoidance of the transfer of \$151,273.90 as the proceeds of Kemper Policy 644, and that he is entitled to judgment, interlocutory though it be, against Wallace in that amount pursuant to 11 U.S.C. § 550(a)(1).

11 U.S.C. § 548(a)(1)(B)

In order to avoid this transfer, the Trustee utilizes both the actual fraud [§ 548(a)(1)(A)] and the constructive fraud [§ 548(a)(1)(B)] provisions of § 548. *Matter of Vitreous Steel Products Co.*, 911 F.2d 1223, 1235-36 (7th Cir. 1990).

11 U.S.C. § 548(a)(1)(B), as applicable to this adversary proceeding, states:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 1 year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

...

(B)(I) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

The Court finds that the Trustee has also demonstrated that the change in ownership and beneficiary of Kemper Policy 644 was a fraudulent transfer within the purview of § 548(a)(1)(B). The *General Search* court stated the requisite proof under § 548(a)(1)(B):

The cause of action under § 548(a)(1)(B) is often referred to as "constructive fraud" because it omits any element of intent. *In re FBN Food Servs., Inc.*, 82 F.3d 1387, 1394 (7th Cir.1996). In order for a trustee to establish a fraudulent conveyance under § 548(a)(1)(B), he must prove the following elements: (1) a transfer of the debtor's property or interest therein; (2) made within one year of the filing of the bankruptcy petition; (3) for which the debtor received less than a reasonably equivalent value in exchange for the transfer; and (4) either (a) the debtor was insolvent when the transfer was made or was rendered insolvent thereby; or (b) the debtor was engaged or about to become engaged in a business or a transaction for which its remaining property represented an unreasonably small capital; or (c) the debtor intended to incur debts beyond its ability to repay them as they matured. *Dunham v. Kisak*, 192 F.3d 1104, 1109 (7th Cir.1999); *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 505 (N.D.Ill.1988); *Barber v. Dunbar (In re Dunbar)*, 313 B.R. 430, 434 (Bank. C.D.Ill.2004). The trustee must prove each element by a preponderance of the evidence. *Friedrich v. Mottaz*, 294 F.3d 864, 867 (7th Cir. 2002); *Baldi v. Lynch (In re McCook Metals, L.L.C.)*, 319 B.R. 570, 587 (Bankr. N.D.Ill.2005).

In re General Search.com, 322 B.R. 836, 842 (Bankr. N.D. Ill. 2005). See also *Kisak*, 192 F.3d at 1109.

First, there was a transfer of the policy proceeds, as addressed above; See, *In re Hatton, Inc.*, 104 B.R. 705, 707 (Bankr. W.D. Pa. 1989) [a change of a beneficiary is a transfer]. Second, the Debtor received less than a reasonably equivalent value in exchange for the transfer; this fact is not in dispute as both parties agree that Wallace gave nothing of value in exchange for the transfer. Third, the transfer was made within one year of the filing of the bankruptcy petition.

Fourth, the Debtor was insolvent when the transfer was made or was rendered insolvent by the transfer. Wallace, in her multiple briefs, did not contravene the Trustee's assertions that the Debtor was insolvent. Only when questioned by the Court during a hearing held on March 17, 2005, did Wallace's attorney express his view that the Debtor was or might have been solvent. Although this issue was raised without any supporting evidence, the Court will be address it in more detail.

The requirement of the Debtor's insolvency was addressed in detail in *General Search.com*. There, the Court stated:

The Code employs a balance sheet approach to the question of insolvency. *Steege v. Affiliated Bank/N. Shore Nat'l (In re Alper-Richman Furs, Ltd.)*, 147 B.R. 140, 154 (Bankr.N.D.Ill.1992). Specifically, section 101(32) of the Code defines "insolvent" and states in relevant part that:

"insolvent" means—

(A) with reference to an entity . . . financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title[.]

11 U.S.C. § 101(32)(A) (2005). The Seventh Circuit has interpreted this definition to require courts to determine what a willing buyer would pay for the debtor's entire package of assets and liabilities. *Covey v. Commercial Nat'l Bank of Peoria*, 960 F.2d 657, 660 (7th Cir.1992). If the price is positive, the debtor is solvent; if the price is negative, the debtor is insolvent. *Id.* A trustee may utilize appropriate means to prove insolvency, including balance sheets, financial statements, appraisals, expert reports, and other affirmative evidence. *Freeland v. Enodis Corp. (In re Consolidated Indus. Corp.)*, 292 B.R. 354, 360 (N.D. Ind. 2002).

322 B.R. at 848-49. See also *Nostalgia Network, Inc., v. Lockwood*, 315 F.3d 717, 719 (7th Cir. 2002) ["when a person transfers money or property to another person without receiving anything in return, and the transferor is insolvent (or made insolvent by the transfer), the transfer is voidable even if there was no intent to hinder creditors."].

With the foregoing principles in mind, the Court's inquiry into the Debtor's solvency begins. The question which the Court must determine under § 548(a)(1)(B)(ii)(I) is "what would a buyer be willing to pay for the debtors entire package of assets and liabilities?" *Covey*, 960 F.2d at 660; *Matter of Xonics Petrochemical*, 841 F.2d at 199; *Matter of Taxman Clothing Co.*,

Inc., 905 F.2d 166 (7th Cir.1990). The Trustee argues that the Debtor's own financial statements show it to be insolvent. Trustee's Ex. 23 – Affidavit of Kenneth A. Manning Financial Records/Tax Returns. Paragraph "7X" of Trustee's exhibit is a Net Worth Report as of April 25, 1999. It shows that the Debtor had a negative balance of \$344,309.07. A Cash Flow Report for the period of January 1, 1999 through April 25, 1999 shows a negative cash flow of \$99.62. ¶ 7W. A Profit and Loss Statement covering the same period shows a negative balance of \$40,218.17. ¶ 7V. A Balance Sheet shows that as of April 25, 1999, the Debtor was in the dark for \$14,019.43. ¶ 7U.

The Debtor's financial situation was not better during the year of 1998. A Cash Flow Report shows a negative balance of \$4,471.40. ¶ 7T. A Profit & Loss Statement for the same year shows a negative flow of \$105,351.49. ¶ 7S. A Balance Sheet figure as of December 31, 1998 shows a negative balance of \$14,119.05. ¶ 7R.

The year of 1997 was also full of losses. A Profit & Loss Statement for the whole year shows a negative balance of \$88,700.87. ¶ 7Q. A Cash Flow Report covering the year of 1996 shows a negative balance of \$3,077.73. ¶ 7P. A 1995 Cash Flow Report shows a positive balance of \$9,017.18. ¶ 7O. The Cash Flow Report for 1994 also shows the Debtor being in the dark for \$2,216.02. ¶ 7N. For a summary see Trustee's Ex. 23 – Facts/Insolvency chart and a Notes to Solvency Chart.

The Trustee argues that it is not necessary to pinpoint the negative balance each and every day, and that courts have no hesitation in applying the princip[le] of "looking back" and retrojection [Trustee's memorandum, pg. 13-14]; *In re Strickland*, 230 B.R. 276, 283 (Bankr. E.D.Va. 1999). The evidence presented by the Trustee – which includes tax returns for the relevant periods, Debtor's Schedules, as well as other financial information – goes far beyond that submitted in *Strickland*. The evidence here shows that the Debtor was under water throughout its operations between 1996 and 1999, each year falling more and more in debt,

and that clearly the price a willing buyer would have paid for the Debtor's assets would have been less than the Debtor's liabilities. The Court thus finds that the Debtor was insolvent within the bounds of section 101(32) of the Code at the time the transfer was made.

Wallace has offered nothing to rebut this conclusion. Wallace's counsel, at the March 17, 2005 hearing, acknowledged that ". . . there is a debt to the corporation, but simply because a struggling business owes money out, does not automatically mean that it's insolvent." Transcript, at 41. Mere speculations or conclusory assertions will not defeat the granting of a summary judgment.

It is beyond question that there is no genuine issue as to any material fact with respect to the Trustee's establishment of the criteria of subsections (II) and (III) of § 548(a)(1)(B)(ii), as well, based upon the Debtor's financial condition on the date of the transfer, the fact that Darrell's death would eviscerate any business in which the Debtor was engaged [a fact which Darrell knew, obviously], and that the transfer deprived the Debtor of any ability to return the base investments made by the Certificate holders to them.

The Court determines that the Trustee is entitled to summary judgment on his claim under 11 U.S.C. § 548(a)(1)(B) for recovery of \$151,273.90 as the proceeds of Kemper Policy 644, and that he is entitled to judgment, interlocutory though it be, against Wallace in that amount pursuant to 11 U.S.C. § 550(a)(1).

11 U.S.C. § 544(b)(1)

A. Uniform Fraudulent Transfer Act

The Trustee also contends that this transfer is avoidable by the provisions of Indiana Uniform Fraudulent Transfer Act, I.C. 32-18-2-1 *et seq.* ["UFTA"], through the portal of 11 U.S.C. § 544(b)(1), which states:

Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation

incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

As articulated by the Honorable Robert Grant:, Judge of the United States Bankruptcy Court for the Northern District of Indiana:

Section § 544(b) of the United States Bankruptcy Code gives the bankruptcy trustee the power to "avoid any transfer of an interest of the debtor in property. . . that is voidable under applicable law by a creditor holding an unsecured claim . . ." 11 U.S.C. § 544(b)(1). In essence, this provision allows the trustee to take advantage of state law concerning fraudulent conveyances. *Matter of Xonics Petrochemical, Inc.*, 841 F.2d 198, 202 (7th Cir. 1988). The result is that "if any unsecured creditor could reach an asset of the debtor outside of bankruptcy, the Trustee can use § 544(b) to obtain that asset for the estate. As part of the estate, the asset is then divided among all the unsecured creditors . . ." *Matter of Leonard*, 125 F.3d 543, 544 (7th Cir. 1997).

Indiana law [FN] recognizes two different types of fraudulent conveyances – those which are actually fraudulent and those which are only constructively so. An "actual fraudulent conveyance" is made with the intent to hinder, delay or delay one's creditors and may be challenged by any creditor regardless of whether their claim arose before or after the transfer was made. I.C. 32-18-2-14. A "constructively fraudulent conveyance," on the other hand, has nothing to do with the intent or motivation surrounding the transfer. Instead, its fraudulent nature is determined solely by the circumstances of the transaction itself. A transfer is constructively fraudulent if it was made for less than reasonably equivalent value and the debtor was either insolvent at the time or became insolvent as a result of the transfer. I.C. 32-18-2-15. Only creditors existing at the time of the transaction may challenge a transfer as constructively fraudulent. *Id.* In either case though, whether it is actually fraudulent or only constructively so, the transfer may be avoided under Indiana law. [FN 2]. I.C. 32-18-2-17, 18.

FN 1. Indiana has adopted the Uniform Fraudulent Transfer Act, the UFTA, which has been codified as I.C. 32-18-2 et seq. Much of the UFTA has been derived from the Bankruptcy Code's provisions concerning fraudulent transfers. As a result, the court can look to bankruptcy decisions for guidance concerning what is otherwise a matter of state law.

FN 2. Given the derivation of the UFTA, it will come as no surprise that Indiana Law concerning what constitutes a fraudulent conveyance is substantially similar to the provisions for the Bankruptcy Code which give the trustee an independent, federal right to avoid such transfers. See, 11 U.S.C. § 548. The essential difference is that the Bankruptcy Code only allows the trustee to challenge transfers made during the year prior to the petition, 11 U.S.C. § 548(a)(1), while Indiana Law allows the trustee to challenge transfers made four or more years prior to the petition. I.C. 32-18-2-19.

In re Williams, Adv. No. 03-1407, pg. 2-3 (Bankr. N.D. Ind. 2004)(Grant, J.), *aff'd*, 1:05-cv-00006 (N.D. Ind. July 12, 2005)(Lee, J.), *appeal docketed*, No. 05-3352 (7th Cir. August 12, 2005). See also *In re Myers*, 320 B.R. 667 (Bankr. N.D. Ind. 2005) (Grant, J.).

So long as an unsecured creditor exists, the Trustee need not identify the unsecured creditor for § 544(b)(1) purposes. *In re Image Worldwide, Ltd.*, 139 F.3d 547 (7th Cir. 1998). The Trustee nevertheless has done that here. The Trustee has identified numerous unsecured creditors, who are for the most part the holders of Investment Notes issued by the Debtor. Two of such creditors are J. Buening and Paul Buening. See March 17, 2005 Hearing Transcript at 8-10 ("Tr.").

The burden of proving a fraudulent transfer under the Act is on the Trustee.

The UFTA is analogous to 11 U.S.C. § 548(a)(1). Thus, much of the analysis made above under 11 U.S.C. § 548(a)(1) is applicable here. I.C. 32-18-2-14, which requires actual fraud, states:

14. A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving reasonably equivalent value in exchange for the transferor obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.

I.C. 32-18-2-15, which requires the proof of constructive fraud, states:

15. A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation incurred if:

(1) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(2) the debtor:

(A) was insolvent at that time; or

(B) became insolvent as a result of the transfer or obligation.

In addressing the requirements of proof in a fraudulent conveyance action, the Court in

Creech wrote:

Fraudulent intent can be inferred from certain indicia called "badges of fraud." *U.S. Marketing Concepts, Inc. v. Don Jacobs Buick-Subaru, Inc.* (1989), Ind.App., 547 N.E.2d 892, 894. Some of the badges from which fraudulent intent can be inferred include: 1) the transfer of property by a debtor during the pendency of a suit; 2) a transfer of property that renders the debtor insolvent or greatly reduces his estate; 3) a series of contemporaneous transactions which strip the debtor of all property available for execution; 4) secret or hurried transactions not in the usual mode of doing business; 5) any transaction conducted in a manner differing from customary methods; 6) a transaction whereby the debtor retains benefits over the transferred property; 7) little or no consideration in return for the transfer; and 8) a transfer of property between family members. *Id.* When there is a concurrence of several badges of fraud an inference of fraudulent intent may be warranted. *Id.* However, no one badge of fraud constitutes a per se showing of fraudulent intent. *Jones v. Central Nat'l Bank of St. Johns* (1989), Ind.App., 547 N.E.2d 887, 890. Rather, the facts must be taken together to

determine how many badges of fraud exist and if together they constitute a pattern of fraudulent intent.

Lee's Ready Mix and Trucking, Inc. v. Creech, 660 N.E.2d 1033, 1037 (Ind. Ct. App. 1996).

See also, *Greenfield v. Arden Seven Penn Partners, L.P.*, 757 N.E.2d 699, 703 (Ind. Ct. App. 2001); *Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp.2d 992, 1006-08 (N.D. Ind. 2005).

The question of fraudulent intent is deemed a question of fact. Lack of consideration alone is not enough to support a charge of fraud. Rather, fraudulent intent may be inferred from various factors or 'badges of fraud' present in a given transaction . . ." *Greenfield*, 757 N.E.2d at 703, citing *Diss v. Agri Bus. Intern., Inc.*, 670 N.E.2d 97, 99-100 (Ind.Ct.App.1996). Also *U.S. v. Smith*, 950 F. Supp. 1394, 1404 (N.D. Ind. 1996).

The totality of the badges of fraud as discussed in *Creech, supra*, lead this Court to the same conclusion reached under § 548(a)(1)(A). Although the transfer here was not made during the pendency of a lawsuit, it nevertheless has the same similarities of a rushed transaction. It was a rushed transaction in light of the timing of Darrell's suicide, which occurred five days later, and in light of Darrell's knowledge then of his intended demise. This was likewise an abnormal transaction in light of the Debtor's normal business activities. Clearly, Darrell intended that his fiancé receive the money instead of the creditors of the Debtor. This transfer also clearly stripped the Debtor of any property that could be distributed to its creditors, most of which are investment note holders. The debtor also received no consideration for this transfer in light of I.C. 32-18-2-13(a). Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition;[UFTA § 3 cmt. 2]. Here, no one disputes that no money or other consideration was exchanged for this transfer, thus the analysis whether the transfer was made for a "reasonably equivalent value" is unnecessary.

In order to establish that the Debtor made a fraudulent transfer prohibited by the constructive fraud section of the UFTA, the Trustee must show that the Debtor (1) made the

transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and (2) was either insolvent at that time or became insolvent as a result of the transfer or obligation. See I.C. 32-18-2-15. *Fire Police City County Fed. Credit Union v. Eagle*, 771 N.E.2d 1188 (Ind. Ct. App. 2002). Under the UFTA, a debtor "is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair market value." I.C. 32-18-2-12(c). The Debtor's insolvency was discussed *supra*, and it is not necessary to repeat it here.

Taking all the badges of fraud into consideration – See, *Jones v. Cent. Nat'l Bank of St. Johns*, 547 N.E.2d 887, 890 (Ind. Ct. App. 1989) – and for the same reasons articulated with respect to § 548(a)(1)(A) and § 548(a)(1)(B), the Court holds that the Trustee established the requisite elements under I.C. 32-18-2-(14) and (15); See, *H. King & Associates*, 295 B.R. at 289.

The Court determines that the Trustee is entitled to summary judgement on his claim under 11 U.S.C. § 544(b)(1) for recovery of \$151,273.90 as the proceeds of Kemper Policy 644, under both I.C. 32-18-2-14 and I.C. 32-18-2-15, and that he is entitled to judgment, interlocutory though it be, against Wallace in that amount pursuant to 11 U.S.C. § 550(a)(1).

11 U.S.C. § 544(b)(1) Under Corporate Responsible Officer and Fiduciary Theories

The Trustee has advanced theories of recovery against Wallace under 11 U.S.C. § 544(b)(1) on several additional grounds, apart from "piercing the corporate veil" which will be subsequently addressed. Those grounds are:

- A. Breach of fiduciary responsibility owed by a corporate officer to the corporation;
and
- B. Personal liability of a corporate officer for acts engaged in by that person in the context of the business of a corporation.

The Court deems these arguments by the Trustee to be a kind of "catch all, gotta make

it, whatever" jab at liability if all else fails – the kind of arguments good lawyers make but don't seriously think are winners. If that's a correct perception, it's a correct perception.

The nature of the duty owed to the corporation by an individual involved in a closely held corporation was defined as follows in *W & W Equip. v. Mink*, Ind. App., 568 N.E. 2d 564, 571 (1991):

The nature of the fiduciary duty is the same regardless of whether it arises in the capacity of a director, officer, or shareholder in a close corporation *Hartung v. Architects Hartung/Olde/Burke, Inc.* (1973) 157 Ind. App. 546, 301 N.E.2d 240, *trans. denied*. 'The fiduciary must deal fairly, honestly and openly with his corporation and fellow stockholders. He must not be distracted from the performance of his official duties by personal interests' *Id.*, 157 Ind. App. At 552, 301 N.E.2d at 243.

Under this theory, the corporation is the wronged party, and the recovery for the acts of the sinning officer inure to the benefit of the corporation directly. The Trustee, as the successor to the Debtor corporation, has a direct cause of action against an officer on this theory, and therefore technically the Trustee's action does not depend upon 11 U.S.C. § 544 – which provides the Trustee with the rights of action which could be asserted by a hypothetical creditor or bona fide purchaser [§ 544(a)], or by an actual creditor holding an unsecured claim [§ 544(b)(1)]. The Court that this theory is more properly assertable under 11 U.S.C. § 542(b), a theory of recovery which the Trustee has not alleged, and that thus with respect to this theory, Wallace is entitled to summary judgment on the Trustee's claims.

A somewhat similar theory, although one which inures to the benefit of wronged parties who live outside the corporation's gaggle of shareholder/officer/director groupies rather than to the corporation itself, is the concept that corporate officers may be held personally liable for tortious or fraudulent corporate acts in which they participate [See, e.g., *Indiana Dep't of Transp. v. McEnergy*, Ind. App., 737 N.E.2d 799, 802 (2000)].

It is also Indiana law that "it is true that a corporate officer or shareholder may not be

held liable for acts by the corporation merely because he is an officer or shareholder [citing *Birt v. Mary Mercy Hosp. of Gary, Inc.*, (1977), Ind. App., 370 N.E.2d 379, 382]." *American Indep. Mgmt. Sys., Inc. V. McDaniel*, Ind. App., 443 N.E.2d 98, 103 (1982).

It is clearly Indiana law that in order to hold Wallace personally liable under either of the foregoing theories with respect to the transactions concerning Kemper Policy 644 in her capacity as an alleged officer of the Debtor,¹⁵ the Trustee must show that Wallace had some personal involvement in the "transfer" transaction with respect to that policy. The record establishes that there is no genuine issue as to any material fact with respect to Wallace's involvement in the change of ownership of this policy from the Debtor to Darrell, and the contemporaneous change of beneficiary to provide her with a 60% beneficiary interest in the proceeds of the policy. The record establishes conclusively that this transaction was all Darrell, and that in fact that at the time it was done, Wallace knew nothing about it and was in Florida.

The Court determines that Wallace is entitled to the entry of summary judgment against the Trustee, on her cross-motion for summary judgment, with respect to the Trustee's claims under 11 U.S.C. § 544(b)(1) against her for recovery of proceeds of Kemper Policy 644 received by her under the theories of breach of fiduciary responsibility owed by a corporate officer to the corporation, and of personal liability of a corporate officer for acts engaged in by that person in the context of the business of a corporation.

B. Piercing the Corporate Veil to Hold Wallace Liable Personally

The Trustee also asserts that Wallace may be held liable for the return of the proceeds of Kemper Policy 644 paid to her pursuant to 11 U.S.C. § 544(b)(1) under the theory of

¹⁵ Based upon the record before it, the Court does find that there is a material issue of fact as to whether Wallace was an "officer" of the Debtor in a only nominal context by virtue of a title bestowed upon her by Darrell Shults, or whether she was involved in the corporation's affairs to such an extent that she was an active participant as an "officer" in the corporation's business. For the purpose of the Trustee's theories addressed in this section, whichever way this factual issue is resolved is irrelevant.

"piercing the corporate veil", as a cause of action that could be asserted by an actual creditor of the debtor. There is no question that the requisite "actual creditor" exists in the form of the Investment Certificate Holders.

This theory is somewhat more involved than the "responsible corporate officer" theories discussed in the preceding section of this decision. Under a "piercing the corporate veil" theory, an individual is deemed to be the "alter ego" of a corporation with the result that the individual becomes liable for all debts and obligations of the corporation, just as if there had been no corporation at all and the individual conducted the corporation's business as a personal venture.

The basic parameters of the concept were defined as follows in *Winkler v. V.G. Reed & Sons, Inc.*, Ind., 638 N.E.2d 1228, 1232 (1994) as follows:

As the Court of Appeals correctly noted, Indiana courts are reluctant to disregard a corporate entity, but will do so to prevent fraud or unfairness to third parties [citations omitted]. The burden is on the party seeking to pierce the corporate veil [citation omitted], to establish 'that the corporation was so ignored, controlled or manipulated that it was merely the instrumentality of another, and that the misuse of the corporate form would constitute a fraud or promote injustice.' [*Gurnik v. Lee*, Ind. App., 587 N.E.2d 706, 710].

When a court exercises its equitable power to pierce a corporate veil, it engages in a highly fact-sensitive inquiry. [citation omitted]. As a general statement, the factors to be considered include whether the corporate form has been adhered to, whether corporate assets are treated as such or are as personal assets, and whether there has been an attempt to deceive third parties [citations omitted].

As further elaborated in *Hart v. Steel Products, Inc.*, Ind. App., 666 N.E.2d 1270, 1277 (1996):

When a court exercises its equitable power to pierce the corporate veil, it engages in a highly fact-sensitive inquiry [citation omitted]. The burden is on the party seeking to pierce the corporate veil to prove that the corporate form was so ignored, controlled or manipulated that it was merely an instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice. [citation omitted]. In determining whether a party has met his burden, a court considers whether evidence has been presented showing: (1)

undercapitalization; (2) absence of corporate records; (3) fraudulent representations by corporate shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling or manipulating the corporate form. [citation omitted].

And in *State v. McKinney*, Ind. App., 508 N.E.2d 1319, 1320-21 (1987) it was writ:

Indiana courts are reluctant to disregard the corporate entity and do so only to protect innocent third parties from fraud or injustice when transacting business with a corporate entity [citations omitted]. The rationale for this rule was summarized in [*Clarke Auto Co., Inc. V. Fyffe*, Ind. App., 116 N.E.2d 532, 535 (1954):

'The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. *The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts.* Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all of its stock and assets will be treated as identical, the corporate entity being disregarded where used *as a cloak or cover for fraud or illegality.*'

116 N.E.2d at 535 (original emphasis) (quoting 13 Am. Jur. § 7, p. 160 (now found at 18 Am.Jur. 2d *Corporations* § 43 (1985))).

In [*Extra Energy Coal Co. V. Diamond Energy*, Ind. App., 467 N.E.2d 439 (1984)] we concluded that '(t)here being no evidence of fraud or misrepresentation, the fact that Extra Energy's decision to do business with Diamond Energy was ultimately a poor one does not raise these circumstances to the level of unfairness, fraud, or injustice necessary to hold General Petroleum and these individuals liable for the debts of Diamond Energy.' We also noted that actual fraud might not be required to pierce the corporate veil: '[a]pplication of the concept of constructive fraud, as requested by the plaintiff-appellant, is unwarranted in light of the absence of misrepresentation or deception.' *Extra Energy*, 467 N.E.2d at 442 n.1.

With the foregoing principles in mind, let's examine the Trustee's claim. The Trustee seeks to recover, for the benefit of creditors of the debtor corporation, proceeds of a life

insurance policy which was originally payable to the corporation solely, but that due to individual acts of Darrell Shults was altered to direct payment of 60% of those proceeds to Wallace. Is this a circumstance in which piercing the corporate veil is a viable theory? The Court determines that it is not. The premise for the Trustee's action is 11 U.S.C. § 544(b)(1), a section which concerns the avoidance of a "transfer". The theory of "piercing the corporate veil" does not concern the avoidance of transfers; rather, this concept is one which, if successfully asserted, causes a person or persons to become liable for corporate debts and liabilities. The transaction at issue here did not create or otherwise involve a debt or obligation owed to any creditor by First Financial. In short, the "piercing the corporate veil" concept is simply not a remedy available for the transaction involving Kemper Policy 644: that theory has no applicability to the avoidance of a transfer of corporate property. See, In re Myers, 320 B.R. 667, 669, fn. 4 (Bankr. N.D. Ind. 2005)(Grant, J).

Thus, there is no genuine issue of material fact as to whether any transfer of proceeds or other interests concerning Kemper Policy 644 may be recovered from Wallace under 11 U.S.C. § 544(b)(1) on the theory of "piercing the corporate veil" under Indiana law, and Wallace is entitled to summary judgment with respect to this asserted theory with respect to Kemper Policy 644.

II. Premiums paid:

The Trustee next argues that he is entitled to recover from Wallace – on the same theories advanced with respect to Kemper Policy 644 – the amounts of all life insurance premiums paid by the Debtor on various life insurance policies. To achieve this end, once again the Trustee relies on § 548(a)(1)(A), 11 U.S.C. § 548(a)(1)(B) and 11 U.S.C. § 544(b)(1) – including other state law causes of action which, among others, include a breach of fiduciary duty and piercing the corporate veil. Each policy premium payment transaction will be addressed in turn.

_____ A. Zurich Kemper policy FK2379646 - premiums totaling \$795.00

The allegations which give root to this claim are simple. In essence, the Trustee asserts that the Debtor's payment of premiums on a policy insuring Darrell's life, which was owned by Darrell and of which Wallace was the primary beneficiary, constitutes fraud. It was fraud on the Debtor's creditors, according to the Trustee, for the insolvent Debtor to continue making premium payments on a policy which provided no benefit to the Debtor. The \$250,000.00 face value policy in question was purchased by Darrell in early 1997. The Debtor made a total of three \$265.00 premium payments on this policy, each one in March of 1997, 1998, and 1999. Following Darrell's death, Wallace received the sum of \$252,123.17 on June 8, 1999.

The Trustee's assertions have implications far beyond the issues in this case. The Trustee is in essence arguing that a closely held corporation which is undercapitalized and essentially insolvent "hinders, delays or defrauds" its creditors when it pays premiums for a life insurance policy which insures the life of its principal for the benefit of beneficiaries other than the corporation or its creditors. If the Court sides with the Trustee on his assertions under 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 548(a)(1)(B), the Court will have in essence decreed that a benefit provided to employees by a significant number of corporations¹⁶ – corporate payment of premiums for life insurance on the lives of employees – is a fraudulent transaction in a circumstance in which the corporation is ultimately determined to have been undercapitalized and/or "insolvent" and/or is ultimately unable to pay its debts. The Court does not deem this to be a wise policy decision because of its broad implications with respect to employee benefits rather routinely provided by corporations and other forms of business enterprise to employees.

While it is true that in this case the benefit provided by First Financial's payment of

¹⁶ Indeed, provided by such recent luminary debtors such as United Airlines.

premiums inured solely to the sole shareholder, President and founder of the corporation, that is the case with any number of closely held corporations. The crux of the Trustee's argument is that a corporation which is not adequately capitalized, or is not profitably operated, so that it can pay its creditors commits fraud on its creditors when it pays a life insurance policy premium on any policy insuring the life of an employee of which the corporation is not the beneficiary. The Court will not adopt a position which has the broad-reaching ramifications of that which the Trustee espouses. The transactions at issue here – in which the corporation paid premiums of \$265 per year over a period of three years on a policy which was never payable to the corporation for the benefit of its creditors, is absolutely distinguishable from the circumstances involving the change of beneficiary with respect to Kemper Policy 644. The Court determines that there is no genuine issue as to any material fact, and that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions concerning recovery of \$795 of premiums paid by First Financial with respect to Kemper Policy 646 under 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 548(a)(1)(B). Obviously, under the same analysis, the Court determines that there is no genuine issue as to any material fact, and that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions concerning recovery of \$795 of premiums paid by First Financial with respect to Kemper Policy 646 under the theory of recovery advanced by the Trustee under 11 U.S.C. § 544(b)(1) by utilization of §§ 14 and 15 of the Indiana Uniform Fraudulent Transfers Act.

The Trustee's assertion that the \$795 of premiums paid by First Financial with respect to Kemper Policy 646 are recoverable from Wallace under 11 U.S.C. § 544(b)(1) under theories of breach of corporate duty owed by Wallace as an officer of First Financial, and on the theory of acts engaged in by an officer in the context of the business of a corporation – fare no better. First, the record establishes that there is no genuine issue as to any material fact that Wallace was not involved in the transactions involving the payment of premiums on Kemper Policy 646.

More importantly, even if she had been, the same policy considerations that were cited by the Court in relation to the Trustee's assertions under 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 548(a)(1)(B) apply to these theories. The Court determines that there is no genuine issue as to any material fact, and that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions concerning recovery of \$795 of premiums paid by First Financial with respect to Kemper Policy 646 under 11 U.S.C. § 544(b)(1) with respect to theories of Wallace's liability as a corporate officer with respect to those premium payments.

As discussed with respect to Kemper Policy 644, the assertion of the theory of "piercing the corporate veil" won't fly to avoid a transfer of corporate property, and thus the Court determines that there is no genuine issue as to any material fact, and that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions concerning recovery of \$795 of premiums paid by First Financial with respect to Kemper Policy 646 under 11 U.S.C. § 544(b)(1) under the theory of "piercing the corporate veil".

The bottom line with respect to Kemper Policy 646: Wallace is entitled to judgment as a matter of law on all theories of recovery advanced by the Trustee.

B. Valley Forge policy TRC1000071 - premiums totaling \$8,068.97

Next, the Trustee asserts the same theories as above and argues for recovery from Wallace of premiums the Debtor paid on Valley Forge life insurance policy TRC1000071 ["TRC071"]. This Valley Forge policy was applied for by Wallace as the insured, and Darrell was its designated beneficiary. The Debtor made 4 premium payments between June 9, 1997 and February 9, 1999, totaling \$8,068.97 with respect to this policy.

Starting from the back and going forward, for the reasons stated above, the theory of "piercing the corporate veil" has no applicability to this policy, and thus Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions against her under this theory.

Next we confront the Trustee's theories under 11 U.S.C. § 544(b)(1), that by application of Indiana law, Wallace is liable for return of the premiums to the Debtor because of her involvement in the premium payment transactions as a corporate officer.

Indiana case law does provide for liability of a corporate officer under certain circumstances for actions of the corporation in which, or with respect to which, an officer was directly involved, or perhaps even failed to act in opposition when a particular transaction was known to him/her – but only if he/she had sufficient "control" within the corporate structure to direct, or influence, the corporation's conduct. The two separate theories advanced by the Trustee are really only one in the context of this case, in which any recovery by the Trustee inures to the benefit of the Debtor's creditors, rather than to the Debtor corporation itself: A corporate officer may be held personally liable to creditors of the corporation, or to the corporation itself, if that officer participates in, or fails to assert control over, a corporate transaction which constitutes a fraud on creditors or constitutes tortious conduct by the corporation. Viewed in this manner, the issue with respect to the Valley Forge TRC071 Policy is whether the payment of premiums on this policy was first a "fraudulent" or "tortious" act, and then second whether Wallace was involved in the transactions involving payment of the policy premiums.

There is no genuine issue as to any material fact that Wallace applied for this policy; that Wallace was the owner and the insured of this policy; that Darrell was the beneficiary of this policy; and that all premiums for the policy were paid by the Debtor. As stated above with respect to Kemper Policy 646, the Court deems there to be "nothing wrong" with a closely held corporation's providing payment for a term life insurance policy on the life of one of its employee principals, no matter who the beneficiary is. But there's the rub here. Wallace contends, and adamantly so, that she was a pawn for Darrell in the operation of the corporation, and that she had no active role in the operation of, or business affairs of, First Financial. Yet,

the record establishes that she was held out to be the Secretary/Treasurer of the corporation: she was represented to investors to be an integral cog in the corporate wheel; and that she signed a number of corporate documents, including checks, as a corporate officer. The record also establishes beyond any question that Wallace herself applied for the TRC policy, and thus any assertion on her part of noninvolvement in the transaction concerning issuance of this policy is to be disregarded. This is a summary judgment proceeding, not the submission of the case on a stipulated record, and thus the Court cannot "weigh the evidence" and determine contested issues of fact. There is thus a genuine issue of material fact as to Wallace's involvement, as an officer of First Financial, in the transactions involving the TRC071 policy.

Next step. If Wallace was an active officer and employee of the corporation, is the provision by the Debtor of payment for a life insurance policy on her life, no matter who the beneficiary is, a transfer recoverable from Wallace under the Trustee's "officer liability" theories? The Court has answered this question previously – NO: In the context of a closely held corporation, the payment of premiums by a corporation for a term life insurance policy insuring the life of an officer/principal of the corporation is just fine, at least as far as the amount of the premiums in this case go. Thus, if Wallace is not ultimately determined to be an officer with sufficient control over the corporation to influence this transaction, then the Trustee will lose on this theory, because Wallace will have been determined to have had no ability to control the actions of the Debtor with respect to payment of premiums. If Wallace is determined to be an officer involved in the business of the corporation, then in the Court's view the provision of this policy to her is neither fraudulent nor tortious. We can now see it coming, can't we? Whichever way the determination goes with respect to Wallace as to her involvement in the corporation, the Trustee loses, as a matter of law. Wallace is thus entitled to summary judgment with respect to the Trustee's theories of officer liability concerning TRC071.

This brings us at last to the Trustee's assertions that the premiums paid for the policy

are recoverable from Wallace under fraudulent conveyance theories.

The focus of the Trustee's action under 11 U.S.C. § 548(a)(1)(A) is that First Financial's payment of the premiums on this policy was undertaken with the "actual intent" to "hinder, delay or defraud . . ." a creditor. If Wallace is determined to have been an actual "key person" in the affairs of the Debtor, Wallace will get a pass on this theory, on the same rationale as stated with respect to Kemper Policy 646. But if Wallace was not active in the corporation, and the payment of the premiums on a policy insuring the life of a "stranger" was made by Darrell alone acting on behalf of First Financial, a different kettle of fish begins to boil, and the odor of the fish boiling doesn't waft completely fresh. But is the odor enough to justify a summary judgment for the Trustee as to actual intent to "hinder, delay or defraud" creditors? The answer again is "NO". In addition to the genuine issue of material fact as to Wallace's involvement in the corporation's business affairs, based upon the summary judgment record before the Court, the Court deems the record insufficient to establish as a matter of law that First Financial's payment of premiums on this policy was made with the **actual intent** to hinder, delay or defraud its creditors, given the genuine issue of material fact as to Wallace's involvement in the operational decisions of the corporation. This issue remains for trial.

Let's turn now to 11 U.S.C. § 548(a)(1)(B). In the context of this provision, the "transfer" is the payment of premiums on a life insurance policy owned by Wallace. There is a genuine issue of material fact with respect to the issue of whether Wallace was in a relationship to the Debtor which would justify the payment of the premiums on this policy as a "benefit" with respect to her status as an employee of the Debtor. It is indisputable that the Debtor received no consideration for the payment of premiums [§ 548(a)(1)(B)(I)], and the Court has previously determined in this opinion that the Debtor was "insolvent" when the premium payments were made [§ 548(a)(1)(B)(ii)(I)]. If Wallace is determined to have been the "outsider" that she

claims she was, then the Trustee will succeed on this claim against Wallace.¹⁷ If Wallace was involved in the corporation's affairs, the Trustee will lose. The Court determines that there is a genuine issue of material fact with respect to recovery from Wallace of \$6000.61 with respect to Valley Forge Policy TRC071 pursuant to 11 U.S.C. § 548(a)(1)(B)(i)/(ii)(I) and 11 U.S.C. § 550(a)(1).

The Court further determines that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 548 (a)(1)(B)(ii)(II) and (III).

Finally, the Trustee asserts that under 11 U.S.C. § 544(b)(1), the premium payments may be recovered from Wallace under § 14 and § 15 of the Indiana Uniform Fraudulent Transfers Act. For the reasons stated above with respect to the Trustee's assertions under 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 548(a)(1)(B)(ii)(II) and (III), the Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544 (b)(1)/I.C. 32-18-2-14. For the reasons stated above with respect to the Trustee's assertions under 11 U.S.C. § 548(a)(1)(B)(i) and (ii)(I), the Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544 (b)(1)/I.C. 32-18-2-15(1) and(2)(A).¹⁸

¹⁷ However, 11 U.S.C. § 548(a)(1)(B) limits the Trustee's recovery to transfers made within the year prior to filing the Debtor's petition, and the record establishes without genuine issue that the premiums paid on this policy during that period were \$2068.36 paid on September 23, 1998 and \$3932.25 paid on February 9, 1999 [the Debtor's petition was filed on June 30, 1999]; the total paid in the one year period prior to the petition was thus \$6000.61.

¹⁸ Because as previously determined, the Debtor was "insolvent" at the times all premiums were paid and there is no limitation applicable to this case with respect to the period prior to the filing of the petition for recovery of transfers under I.C. 32-18-2-15, if the Trustee succeeds on this theory, the Trustee will be entitled to recover \$8068.97 from Wallace pursuant to 11 U.S.C. § 550(a)(1) on this theory of recovery.

C. Valley Forge policy TRCI000028 - premiums totaling \$8,068.97

The Trustee seeks to recover premiums paid by the Debtor on a life insurance policy ["TRC028"] with respect to which Wallace's life was insured for the benefit of the Debtor First Financial as the beneficiary. The same theories of recovery of premiums as in the foregoing actions with respect to Kemper Policies 644 and 646 are advanced against Wallace by the Trustee.

As addressed above, the prospectus provided by the Debtor to its investors stated that "key person" coverage was provided by First Financial with respect to Wallace. How paying premiums for a life insurance policy in conformity with this representation is an action to "hinder, delay, or defraud creditors" escapes the Court, as does the assertion that Wallace – whether or not she had active involvement in the decision to pay these premiums – breached some form of duty she owed First Financial and its creditors by causing the Debtor to pay these premiums. Creditors would only have benefitted by Wallace's death under the provisions of this policy. There is no sustainable theory of recovery against Wallace with respect to this claim.

The Court determines that there is no genuine issue as to any material fact, and that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions concerning recovery of premiums totaling \$8,068.97 on Valley Forge policy TRCI000028.

D. New York Life policy A0328853 - premiums totaling \$1024.40

This New York policy was also applied for by Wallace, listed Wallace as the insured, and Darrell as the beneficiary. The Debtor, according to the Trustee, made three premium payments: January 29, 1997 – \$350.00, March 2, 1998 - \$334.20, and February 9, 1999 – \$340.20, for the total of \$1,024.40.

The analysis made with respect to Valley Forge Policy TRC071 is totally applicable here.

Starting from the back and going forward, for the reasons stated above, the theory of

"piercing the corporate veil" has no applicability to this policy, and thus Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions against her under this theory.

Next we confront the Trustee's theories under 11 U.S.C. § 544(b)(1), with respect to corporate officer liability. There is no genuine issue as to any material fact that Wallace applied for this policy; that Wallace was the owner and the insured of this policy; that Darrell was the beneficiary of this policy; and that all premiums for the policy were paid by the Debtor. There is a genuine issue of material fact as to Wallace's involvement, as an officer of First Financial, in the transactions involving this policy. But as stated above, however that factual issue sorts out, the Trustee loses on this theory of recovery. Thus, Wallace is entitled to judgment as a matter of law on the Trustee's two theories of corporate officer liability with respect to the premium payments made by the Debtor on this policy.

Based upon the summary judgment record before the Court, the Court deems the record insufficient to establish as a matter of law that First Financial's payment of premiums on this policy was made with the **actual intent** to hinder, delay or defraud its creditors, even assuming that Wallace was not involved in any manner in the operational decisions of the corporation. This issue remains for trial.

It is indisputable that the Debtor received no consideration for the payment of premiums [§ 548(a)(1)(B)(I)], and the Court has previously determined in this opinion that the Debtor was "insolvent" when the premium payments were made [§ 548(a)(1)(B)(ii)(I)]. If Wallace is determined to have been the "outsider" that she claims she was, then the Trustee will succeed on this claim against Wallace.¹⁹ If Wallace was involved in the corporation's affairs, the Trustee

¹⁹ However, 11 U.S.C. § 548(a)(1)(B) limits the Trustee's recovery to transfers made within the year prior to filing the Debtor's petition, and the record establishes without genuine issue that the premium paid on this policy during that period was \$340.20 paid on February 9, 1999[the Debtor's petition was filed on June 30, 1999].

will lose. The Court determines that there is a genuine issue of material fact with respect to recovery from Wallace of \$340.20 with respect to the New York Life policy pursuant to 11 U.S.C. § 548(a)(1)(B)(i)/(ii)(I) and 11 U.S.C. § 550(a)(1).

The Court further determines that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 548 (a)(1)(B)(ii)(II) and (III).

Finally, the Trustee asserts that under 11 U.S.C. § 544(b)(1), the premium payments may be recovered from Wallace under § 14 and § 15 of the Indiana Uniform Fraudulent Transfers Act. For the reasons stated above with respect to the Trustee's assertions under 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 548(a)(1)(B)(ii)(II) and (III), the Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544(b)(1)/I.C. 32-18-2-14. For the reasons stated above with respect to the Trustee's assertions under 11 U.S.C. § 548(a)(1)(B)(i) and (ii)(I), the Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544(b)(1)/I.C. 32-18-2-15(1) and(2)(A).²⁰

E. Principal Mutual Life policy N3505-4716 . . . – premiums totaling \$1,200.00.

The last of the insurance policies subject to this action is the Principal Mutual Life policy. Here, the Debtor was the owner and Plan holder of this group health and life insurance policy, Darrel was its plan member/insured and Wallace was the beneficiary. On April 12, 1999, Debtor made a premium payment of \$1,200.00 and on August 1st, because of Darrell's suicide,

²⁰ Because as previously determined, the Debtor was "insolvent" at the times all premiums were paid and there is no limitation applicable to this case with respect to the period prior to the filing of the petition for recovery of transfers under I.C. 32-18-2-15, if the Trustee succeeds on this theory, the Trustee will be entitled to recover \$1024.40 from Wallace pursuant to 11 U.S.C. § 550(a)(1) on this theory of recovery.

Wallace received \$100,000.00 in death benefits.

Based upon the record before it, the Court determines that the issues of recovery of premiums under this policy are identical to the issues with respect to Kemper policy 646. This policy was a group employee plan term policy, and the Court simply will not invalidate premiums paid on a policy of this nature, at least to the extent of the premiums paid in this case.

The Court determines that Wallace is entitled to summary judgment in her favor on all theories of recovery advanced by the Trustee with respect to the Principal Mutual Life policy.²¹

III. \$305,000.00 - Investment Certificates

The Trustee also seeks to recover from Wallace the total amount of unpaid Investment Note Certificates, which amount to \$305,000.00. The Trustee's theories are based on piercing of the corporate veil, and breach of Wallace's fiduciary duties as an officer of the debtor.

First, the Trustee argues that the Debtor was involved in a 'ponzi scheme' when it solicited investments from outside investors. The summary judgment record does not support this conclusion, however, as the record shows that the Debtor did in fact make some interest payments on some of the investment notes it issued, and in one situation paid off the whole investment note in the amount of \$5,000.00. The record also shows that Darrell made various business trips, some of which were trips to attend real estate investment seminars. Such attendance does not support a finding that the Debtor never intended to make its investors whole. However, the record does not negate the Trustee's assertion as a matter of law. There is a "sniff" of conduct here which precludes a determination that the business of First Financial was legitimate investment management.

The Trustee has asserted 11 U.S.C. § 544(b)(1) as his premise for recovery. That section applies only to the recovery of transfers of property by the Debtor; See, In re Myers,

²¹ This determination moots the factual issue noted in footnote 18 above.

320 B.R. 667, 669, fn. 4 (Bankr. N.D. Ind. 2005)(Grant, J). With respect to this claim, the Trustee is not seeking recovery of a transfer, but rather is seeking to hold Wallace liable for the debts owed by the Debtor to its creditors.

The action asserted by the Trustee of piercing the corporate veil is assertable in the context of this case in the Court's opinion, if at all, only under 11 U.S.C. § 544(a). The record conclusively establishes that the Trustee has not based his claims on this section, and thus – without further discussion of what might have been the result under 11 U.S.C. § 544(a) – the Court determines that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions of liability against her for recovery of the amount of indebtedness owed by the Debtor to its creditors under a theory of piercing the corporate veil.

As to the two theories of liability of a corporate officer for corporate debts, there are genuine issues of material fact as to Wallace's involvement in, and control over, the Debtor's business affairs, which preclude summary judgment for either party. The Court notes that the Trustee's burden at trial with respect to this attempted item of recovery will be especially difficult, given that he will be required to show not only that the entire corporate existence of the Debtor was essentially a sham, but also that Wallace was an active participant in the scam.

IV. GE Account - \$1,023.86

Lastly, the Trustee seeks to recover from Wallace the sum of \$1,023.86, the amount of charges Wallace made to the Debtor's corporate credit card for personal, nonbusiness-related expenses. The Trustee asserts the same theories of recovery as outlined above with respect to his attempted recovery of life insurance policy premiums and proceeds.

The record in this case establishes that Wallace was an authorized user of the GE credit card. [Trustee's Ex. 16]. Wallace, in her briefs, states that Darrell gave her the GE credit card and told her to use it. Wallace does not dispute that she used the credit card when she traveled to Florida for personal reasons, unrelated to any business of the Debtor.

There is no evidence in the record before the Court that the Debtor paid the charges incurred for Wallace's personal trip. While the concept of "transfer" is very broad, and the concept of "property" is also very broad – under both 11 U.S.C. §§ 544 and 548 – the Court is unwilling to extend either concept to encompass a circumstance in which a person, whether or not associated with a corporation, uses corporate credit for which the corporation itself does not pay. In this circumstance, there simply isn't any "transfer" of property of the corporation for the benefit of anyone: the incursion of a debt is not a transfer of property or of an interest in property. As a result, the Court finds that Wallace is entitled to judgment as a matter of law with respect to the Trustee's theories of "transfer" under 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 548(a)(1)(B), and also under the related theories of transfer recovery under 11 U.S.C. § 544(b)(1) with reference to the §§ 14 and 15 of the Indiana Uniform Fraudulent Transfers Act.

That leaves us with the theories of recovery for breach of corporate officer duty and "piercing the corporate veil". As addressed above, the theories advanced by the Trustee revolve around 11 U.S.C. § 544(b)(1), which requires a "transfer" as a premise for the assertion of recovery. There was no "transfer" with respect to Wallace's use of the Debtor's credit card, and thus the Court finds that Wallace is entitled to judgment as a matter of law with respect to the Trustee's theories of corporate officer liability and "piercing the corporate veil" under 11 U.S.C. § 544(b)(1).²²

V. Pre-judgment interest and punitive damages

²² There are theories which the Court would allow to pursue recovery of the amount of unpaid credit card charges in the context of use of corporate credit by a person not associated with the corporation -- or excessive or personal, nonbusiness-related use of corporate credit by a person associated with the corporation. The Trustee has only pursued this claim under 11 U.S.C. § 544(b)(1), which isn't one of those theories. The Court notes for those gentle readers of this opinion other than the litigants that the argument that use of credit for personal purposes is just hunky-dory if the use of that credit, combined with the employment compensation of the user, does not result in excessive compensation – See, Steinberg v. Buczynski, 40 F.3d 890 (7th Cir. 1994) – won't fly unless the user declared the credit extension by the corporation as income for the purpose of federal and state income taxation; See, Buczynski, 40 F.3d 890.

The Trustee also asks this Court to award him pre-judgment interest and punitive damages. The Court deems the Trustee's demand for pre-judgment interest appropriate to grant to the extent of the Trustee's recovery granted by this decision. The Trustee is entitled to receive pre-judgment interest from June 21, 2001, the date of filing of this adversary complaint, at the rate of 3.47% per annum, on the amounts determined to be recoverable from Wallace; See, *In re Globe Building Materials, Inc.*, 325 B.R. 253, 264 (Bankr. N.D. Ind. 2005), citing *Matter of P.A. Bergner & Co.*, 140 F.3d 1111, 1123 (7th Cir.1998); *In re Industrial & Mun. Engineering, Inc.*, 127 B.R. 848, 851 (Bankr.C.D.Ill.1990). See also *In re U.S.A. Diversified Products, Inc.*, 193 B.R. 868, 881-82 (Bankr. N.D. Ind. 1995).

With respect to the Trustee's claim for punitive damages, because the Trustee is pursuing the claim for punitive damages under common law principles, rather than under I.C. 34-24-3-1, the provisions of I.C. 34-51-3-1 *et seq.* apply to this action. I.C. 34-51-3-1 states that the "chapter applies to all cases in which a party requests the recovery of punitive damages in a civil action" (emphasis supplied). To the extent that I.C. 34-51-3-1 *et seq.* applies, any recovery of punitive damages must be proven by clear and convincing evidence [I.C. 34-51-3-2], and – more significantly – any punitive damages awarded must be paid to the Clerk of the Court in which the judgment was entered, to be disbursed by that officer in part to the plaintiff (25% of the award) and in part to the Violent Crime Victims Compensation Fund established by the State of Indiana (75% of the amount of the award). This Court will not adopt and apply a state law provision which causes a federal court to be a collection agent/remitter for a state – and thus answerable to a State authority for its actions – and thus the Court determines as a matter of law that the Trustee is not entitled to punitive damages.

Even apart from the foregoing, this is a summary judgment record, and the evidence before the Court for that purpose fails to establish the degree of involvement by Wallace in the transactions with respect to which the Trustee has sought recovery from her necessary for the

imposition of punitive damages, putting aside the issue of whether the conduct involved here can even sustain such an award. The Court determines that Wallace is entitled to judgment as a matter of law on the Trustee's claim for punitive damages.

IT IS THUS ORDERED:

I. With Respect to **Kemper Policy 644**:

A. ____ The Court determines that the Trustee is entitled to summary judgement on his claim under 11 U.S.C. § 548(a)(1)(A) for avoidance of the transfer of \$151,273.90 as the proceeds of Kemper Policy 644, and that he is entitled to judgment, interlocutory though it be, against Wallace in that amount pursuant to 11 U.S.C. § 550(a)(1).

B. The Court determines that the Trustee is entitled to summary judgement on his claim under 11 U.S.C. § 548(a)(1)(B) for recovery of \$151,273.90 as the proceeds of Kemper Policy 644, and that he is entitled to judgment, interlocutory though it be, against Wallace in that amount pursuant to 11 U.S.C. § 550(a)(1).

C. The Court determines that the Trustee is entitled to summary judgement on his claim under 11 U.S.C. § 544(b)(1) for recovery of \$151,273.90 as the proceeds of Kemper Policy 644, under both I.C. 32-18-2-14 and I.C. 32-18-2-15, and that he is entitled to judgment, interlocutory though it be, against Wallace in that amount pursuant to 11 U.S.C. § 550(a)(1).

D. The Court determines that Wallace is entitled to the entry of summary judgment against the Trustee, on her cross-motion for summary judgment, with respect to the Trustee's claims under 11 U.S.C. § 544(b)(1) against her for recovery of proceeds of Kemper Policy 644 received by her under the theories of breach of fiduciary responsibility owed by a corporate officer to the corporation, and of personal liability of a corporate officer for acts engaged in by that person in the context of the business of a corporation.

E. The Court determines that there is no genuine issue of material fact as to whether any transfer of proceeds or other interests concerning Kemper Policy 644 may be recovered from Wallace under 11 U.S.C. § 544(b)(1) on the theory of "piercing the corporate veil" under Indiana law, and Wallace is entitled to summary judgment with respect to this asserted theory with respect to Kemper Policy 644.

II. With Respect to **Kemper Policy 646:**

A. The Court determines that Wallace is entitled to judgment as a matter of law on all theories of recovery advanced by the Trustee.

III. With Respect to **Valley Forge policy TRCI000071:**

A. The Court determines Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions against her under the theory of "piercing the corporate veil".

B. The Court determines that Wallace is entitled to summary judgment with respect to the Trustee's theories of officer liability concerning TRC071.

C. In addition to the genuine issue of material fact as to Wallace's involvement in the corporation's business affairs, based upon the summary judgment record before the Court, the Court deems the record insufficient to establish as a matter of law that First Financial's payment of premiums on this policy was, or was not, made with the **actual intent** to hinder, delay or defraud its creditors, under 11 U.S.C. § 548(a)(1), even assuming that Wallace was not involved in any manner in the operational decisions of the corporation. This issue remains for trial.

D. The Court determines that there is a genuine issue of material fact with respect to recovery from Wallace of \$6000.61 with respect to Valley Forge Policy TRC071 pursuant to 11 U.S.C. § 548(a)(1)(B)(i)/(ii)(I) and 11 U.S.C. § 550(a)(1). This issue remains for

trial.

E. The Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544(b)(1)/I.C. 32-18-2-14.

F. The Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544(b)(1)/I.C. 32-18-2-15(1) and(2)(A).

IV. With Respect to **Valley Forge policy TRCI000028**:

A. The Court determines that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions concerning recovery of premiums totaling \$8,068.97 on Valley Forge policy TRCI000028.

V. With Respect to **New York Life policy A0328853**:

A. The Court determines that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions against her under the theory of "piercing the corporate veil".

B. The Court determines that Wallace is entitled to judgment as a matter of law on the Trustee's two theories of corporate officer liability with respect to the premium payments made by the Debtor on this policy.

C. The Court deems the record insufficient to establish as a matter of law that First Financial's payment of premiums on this policy was made, or was not made, with the **actual intent** to hinder, delay or defraud its creditors under 11 U.S.C. § 548(a)(1), even assuming that Wallace was not involved in any manner in the operational decisions of the corporation. This issue remains for trial.

D. The Court determines that there is a genuine issue of material fact with

respect to recovery from Wallace of \$340.20 with respect to premiums paid by the Debtor for this policy pursuant to 11 U.S.C. § 548(a)(1)(B)(i)/(ii)(I) and 11 U.S.C. § 550(a)(1). This issue remains for trial.

E. The Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544(b)(1)/I.C. 32-18-2-14.

F. The Court finds that there is a genuine issue of material fact, precluding summary judgment for either party, with respect to the Trustee's recovery under 11 U.S.C. § 544(b)(1)/I.C. 32-18-2-15(1) and(2)(A).

VI. With Respect to **Principal Mutual Life Policy N3505-4716:**

A. The Court determines that Wallace is entitled to summary judgment in her favor on all theories of recovery advanced by the Trustee with respect to the Principal Mutual Life policy.

VII. With Respect to **\$305,000. Investment Certificate Debt:**

A. The Court determines that Wallace is entitled to judgment as a matter of law with respect to the Trustee's assertions of liability against her for recovery of the amount of indebtedness owed by the Debtor to its creditors under a theory of piercing the corporate veil.

B. The Court Determines that as to the two theories of liability of a corporate officer for corporate debts, there are genuine issues of material fact as to Wallace's involvement in, and control over, the Debtor's business affairs, which preclude summary judgment for either party. These theories remain for trial.

VIII. With Respect to **GE Credit Card Account:**

A. The Court determines that Wallace is entitled to judgment as a matter of law with respect to the Trustee's theories of "transfer" under 11 U.S.C. § 548(a)(1)(A) and 11

U.S.C. § 548(a)(1)B), and also under the related theories of transfer recovery under 11 U.S.C. § 544(b)(1) with reference to the §§ 14 and 15 of the Indiana Uniform Fraudulent Transfers Act.

B. The Court determines that Wallace is entitled to judgment as a matter of law with respect to the Trustee's theories of corporate officer liability and "piercing the corporate veil" under 11 U.S.C. § 544(b)(1).

IX. Pre-Judgment Interest:

A. The Trustee is entitled to the recovery of prejudgment interest at the rate of 3.47% per annum from the date of filing of the complaint in this adversary proceeding to the date of entry of final judgment with respect to all recoveries determined in the Trustee's favor in this Order.

X. Punitive Damages:

A. The Court determines that Wallace is entitled to judgment as a matter of law on the Trustee's claim for punitive damages.

IT IS FURTHER ORDERED that a scheduling conference will be held on **November 17, 2005, at 2:00 P.M.** to schedule trial on all issues in this case which remain for determination in light of this decision.

Dated at Hammond, Indiana on October 13, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger
United States Bankruptcy Court

Distribution:
Attorneys of Record
Elmer Shults